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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 690

INSURANCE GROUP COMMITTEE, REORGANIZATION COMMITTEE, GUARANTY TRUST COMPANY OF NEW YORK, TRUSTEE, ET AL., PETITIONERS,

vs.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 12, 1946.

CERTIORARI GRANTED DECEMBER 16, 1946.

UNITED STATES CIRCUIT COURT OF APPEALS
TENTH CIRCUIT
No. 3425

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Debtor, and THE DENVER AND SALT LAKE WESTERN RAILROAD COMPANY, Subsidiary Debtor,

vs. *Appellants,*

JOHN EVANS, J. F. FITZPATRICK, HARVEY J. GUNDERSON, RICHARD K. PAYNTER, JR., and EUGENE A. SCHMIDT, JR., Reorganization Committee under the Plan of Reorganization of The Denver and Rio Grande Western Railroad Company, Debtor; WILSON McCARTHY and HENRY SWAN, as Trustees of the property of The Denver and Rio Grande Western Railroad Company; H. ALLYN HICKS, JR., as Trustee of the property of The Denver and Salt Lake Western Railroad Company; UNITED STATES TRUST COMPANY OF NEW YORK; CHASE NATIONAL BANK OF THE CITY OF NEW YORK; GUARANTY TRUST COMPANY OF NEW YORK; CITY BANK-FARMERS TRUST COMPANY; CENTRAL HANOVER BANK AND TRUST COMPANY; INSURANCE GROUP COMMITTEE; RECONSTRUCTION FINANCE CORPORATION; MOFFAT TUNNEL IMPROVEMENT DISTRICT AND COMMISSION; THE STATE OF COLORADO; AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.

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United States Circuit Court of Appeals

TENTH CIRCUIT

No. 3425

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Debtor, and THE DENVER AND SALT LAKE WESTERN RAILROAD COMPANY, Subsidiary Debtor,

Appellants,

vs.

JOHN EVANS, J. F. FITZPATRICK, HARVEY J. GUNDERSON, RICHARD K. PAYNTER, JR., and EUGENE A. SCHMIDT, JR., Reorganization Committee under the Plan of Reorganization of The Denver and Rio Grande Western Railroad Company, Debtor; WILSON McCARTHY and HENRY SWAN, as Trustees of the property of The Denver and Rio Grande Western Railroad Company; H. ALLYN HICKS, JR., as Trustee of the property of The Denver and Salt Lake Western Railroad Company; UNITED STATES TRUST COMPANY OF NEW YORK; CHASE NATIONAL BANK OF THE CITY OF NEW YORK; GUARANTY TRUST COMPANY OF NEW YORK; CITY BANK-FARMERS TRUST COMPANY; CENTRAL HANOVER BANK AND TRUST COMPANY; INSURANCE GROUP COMMITTEE; RECONSTRUCTION FINANCE CORPORATION; MOFFAT TUNNEL IMPROVEMENT DISTRICT AND COMMISSION; THE STATE OF COLORADO; AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.

FILED: Oct. 30, 1948. ROBERT B. CARTWRIGHT, Clerk.

[fol. 3]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO SITTING AT DENVER.

Pleas and Proceedings before The Honorable J. Foster-Symes, Judge of the United States District Court for the District of Colorado, presiding in the following entitled cause:

In the Matter of
8669 In Bankruptcy

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Debtor, and

THE DENVER AND SALT LAKE WESTERN RAILROAD COMPANY, Subsidiary Debtor.

PETITION OF THE DEBTOR FOR AN ORDER OF THIS COURT (a) VACATING AND SETTING ASIDE ITS ORDERS OF OCTOBER 25, 1943 AND NOVEMBER 29, 1944, APPROVING AND CONFIRMING THE PLAN OF REORGANIZATION CERTIFIED TO IT BY THE INTERSTATE COMMERCE COMMISSION AND (b) REFERRING THIS PROCEEDING BACK TO THE INTERSTATE COMMERCE COMMISSION FOR THE FORMULATION OF A NEW PLAN UNDER SUBSECTION (d) OF SECTION 77 OF THE NATIONAL BANKRUPTCY ACT.

The Denver and Rio Grande Western Railroad Company, the Debtor in this proceeding (herein called the Debtor) files this Petition pursuant to the authority vested in it by Section 77 of the National Bankruptcy Act and hereby represents to the Court as follows:

1. This Petition is filed by the Debtor in its corporate capacity both in its own right and as the representative of its creditors and stockholders to the extent that they are not otherwise lawfully and fully represented herein and without limiting the generality of such representation it specifically asks relief (a) on behalf of the holders of its General Mortgage Bonds, if by reason of the limitations of Section 77 of the National Bankruptcy Act they may not be lawfully and fully represented in this proceeding by City

Bank Farmers Trust Company as Mortgage Trustee; (b) on behalf of its general or unsecured creditors; and (c) on behalf of the holders of its Preferred Stock and Common Stock.

2. In filing this Petition the Debtor invokes the equity [fol. 4] powers of this Court as a Court of Bankruptcy and the equity powers expressly granted it in proceedings under Section 77 of the National Bankruptcy Act by the provisions of Subsection (a). The vital equity power hereby invoked is the power to do justice to any and all parties in interest at any stage of the proceeding and to prevent the entry of, or to vacate and set aside, a decree or determination which may be unfair, inequitable or unjust by reason of the discovery of new evidence or by reason of changed circumstances or a fundamental alteration of economic conditions or by reason of any new factor or substantial change of a former situation or status which causes such decree to be one of doubtful propriety and calculated to disturb and distress the conscience of the Court. In the Opinions of the Supreme Court of the United States rendered March 15, 1943, in the case of *Ecker* v. *Western Pacific Railroad Corporation and others,* (318 U. S. 448) and in the case of *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company* (318 U. S. 523) and also in the Opinion of the Supreme Court of the United States rendered June 10, 1946, in the proceeding in which this Petition is filed it is recognized that a change in economic conditions may require a reexamination into the present fairness of a Plan of Reorganization previously formulated by the Interstate Commerce Commission and approved or confirmed by the Court.

3. By order or decree dated October 25, 1943, this Court approved, and by order or decree dated November 29, 1944, confirmed a Plan of Reorganization for the Debtor which had been certified to it by the Interstate Commerce Commission on June 14, 1943, and which was based upon a record formally closed on May 20, 1941. In the period between May 20, 1941, when the record in this proceeding [fol. 5] was closed by the Interstate Commerce Commission, and August 13, 1946, when the President of the United

States published the Memorandum of Disapproval of S. 1253 which had been presented to him on August 1, 1946, pursuant to Section 7 of Article I of the Constitution of the United States, there have occurred in the United States of America and in the section or territory thereof served by the railways and facilities of the Debtor a series of changes in the National economy, in the railway industry and in the earning power of the Debtor's properties and in legislative and executive action since the confirmation of the Plan interpretative of what is "fair, equitable and in the public interest", which have completely undermined the foundation and the philosophy of the Plan of Reorganization for the Debtor certified by it to this Court on June 14, 1943, and in consequence thereof said Plan is not now, if ever it was, a fair and equitable Plan conforming to the standards and requirements prescribed by Section 77 of the National Bankruptcy Act.

4. The Petitioner, without limiting or restricting the scope of this Petition as embracing all changes in the National economy and in the railway industry and in the earning power of the Debtor's properties, hereby specifies the following as factors which should be fully explored in an open hearing before finality may properly be accorded a Plan of Reorganization for the Debtor formulated as early as June 14, 1943 upon a record closed as early as May 20, 1941:

(a) The decline in money rates to a level far below the rates prevailing at these dates;

(b) The recent public offering by the Government and purchase by private capital for private operation of the steel plant at Geneva, near Provo, Utah, which had been constructed by the Government in the exigencies of the War at a cost in excess of $200,000,000;

(c) A permanent elevation of the National income [fol. 6] through intensified industrial activity involving for the indefinite future a greatly increased demand for railway transportation.

Each of these factors which will be elaborated in its order under a distinguishing caption alone is sufficient to render

obsolete, unfair, inequitable and unjust a Plan of Reorganization developed on the basis of pre-war standards and pre-war data and that taken collectively they create a presumption of obsolescence so nearly conclusive that a Court of Equity could not properly ignore it.

(*A*) *Decline in money rates:* In order properly to appraise the impact of the decline in money rates it is necessary to give the legislative background of the President's Memorandum of Disapproval dated August 13, 1946 of the relief measure, S. 1253, commonly known as the Wheeler-Reed Bill. As heretofore alleged the Supreme Court of the United States on March 15, 1943 had rendered the two decisions cited above approving Plans of Reorganization promulgated under Section 77 of the Bankruptcy Act which declared worthless all of the equity capital invested in the several properties and made only partial provision for the indebtedness secured by the junior mortgage liens. These Plans were based upon assumed values certified by the Interstate Commerce Commission as reflecting the capitalization at an undisclosed rate of estimated future income in amounts likewise undisclosed. Legislation shortly thereafter was introduced in the House of Representatives by a member of the Judiciary Committee to correct the misinterpretation placed upon Section 77 of the Bankruptcy Act by the Interstate Commerce Commission and sustained by the Supreme Court of the United States which made possible the alarming forfeitures of private capital occurring in the railway industry. This legislation was merged into or was superseded by S. 1253, a measure agreed upon in conference by the Senate and House of Representatives [fol. 7] and adopted on July 31, 1946 and presented to the President of the United States on the following day pursuant to Section 7 of Article I of the Constitution. This unusual and drastic action on the part of Congress was the result of intensive study on the part of the Interstate Commerce Committee of the Senate and the Judiciary Committee of the House of Representatives. Reference is hereby made to Report No. 1615 H.R. Seventy-Eighth Congress, Second Session, on H.R. 4960; Report No. 48 H.R. Seventy-Ninth Congress, First Session H.R. 37; Report No. 1838 of the Seventy-Ninth Congress, Second

Session, on H.R. 5924; Report on S. Res. 192, Seventy-Ninth Congress, First Session, and S. Reports No. 925 and 1170 on S. 1253; Seventy-Ninth Congress, First Session, and to the Hearings on H.R. 4779 afterwards renumbered H.R. 5924 and the Hearings on S. 1253. From these public records it will be made clear to this Court that Congress definitely and after due deliberation has refused to accept as in accord with the true intent of Section 77 or as legally sound or morally and economically admissible the forfeiture policy of the Interstate Commerce Commission underlying the reorganizations which have been carried into effect under the decisions of the Supreme Court of the United States rendered on March 15, 1943. From the President's Memorandum of Disapproval of the relief legislation as passed by Congress on July 31, 1946, the President has made it equally clear that included among his underlying objections were the attempted exclusion of the Denver and Rio Grande Western Railroad Company and the exclusion of other debtor roads from the remedial provisions of the Bill and the failure of Congress adequately to provide against future forfeitures and at the same time to make immediate provision for the refinancing by carriers in judicial custody of their outstanding Bonds bearing interest at rates long since obsolete. It had become apparent to the President that the favorable change in interest rates for railway Bonds could with legislative aid be availed of [fol. 8] *during* the administrative period of the proceeding to prevent the confiscation of valuable equities instead of being used as in other cases of which Chicago Northwestern Railway Company is typical to unduly fatten and enrich creditor groups to whom the equities are passing under the reorganization process.

On this point the President said:

> "The bill fails to direct specifically the immediate reduction of the grossly excessive interest rates now wasting the funds of railroads in Section 77 proceedings. Millions of dollars per year can be saved at once for each of the railroads in Section 77 proceedings by reducing interest rates on their bonds and other debt down to the level of interest rates paid by railroads not in Section 77 proceedings."

What the President visualized was a provision setting up machinery for refinancing of bonds bearing unduly high interest rates during the progress of the Section 77 proceeding and it is manifest that such a provision would be sound and salutary. But legislation is not needed to enable a Court of Equity to vacate and set aside its Orders approving and confirming a Plan of Reorganization if before the Plan is carried into effect the interest rates specified for the new capital structure have by reason of changed economic conditions became outmoded and obsolete. Since the date of the Order or Decree of this Court approving the Plan of Reorganization certified to it on June 14, 1943, by the Interstate Commerce Commission there have been a series of refinancing of railway securities demonstrating that the interest and dividend rates prescribed in the Plan are at a level far higher than can be justified by present day conditions. The following list is illustrative but by no means all inclusive:

[fol. 9]

Name	Date of Refinancing	Interest rate of old issue	Interest rate of new issue
Chicago, Burlington and Quincy R. R. Co.	Aug. 1-Dec. 1, 1944	4-5%	3½% 1½% 3¾%
Chicago and Northwestern Railway Co.	Jan. 1, 1945	4%	3%
Pennsylvania Railroad Company	Jan. 1, 1945	4½%	3⅛%
Pere Marquette Railroad Co.	Mar. 1, 1945	4-5%	3⅜%
Wabash Railroad Company	Feb. 1, 1945	4%	3¼%
Washington Terminal Co.	Feb. 1, 1945	3½-4%	2⅝%
Rio Railroad Co.	Jan. 1, 1945	4%	3⅛%
Erie Railroad Co.	Mar. 15, 1945	3⅛%	2%
Reading Company	Apr. 1, 1945	4-5%	3⅛%
New York Connecting R. R.	Oct. 1, 1945	3½%	2⅞%
Lehigh & New England R. R.	Nov. 1, 1945	4%	3%
Western Maryland Railway	Nov. 1, 1945	5½%	1¾%-3¼%
Pennsylvania Ohio and Detroit R. R. Co.	Oct. 1, 1945	3⅝%-4½%	2⅞%
Term. R. R. Ass'n of St. Louis	Oct. 1, 1945	3⅝%-4%	2⅞%

From the foregoing data it is manifest that a reduction averaging 1½% in interest and dividend rates for capital

structures set up prior to November 29, 1944 would be necessary to conform them to the present day security markets. This it must be emphasized is not a temporary condition—long term contracts—contracts fixing the new rates for terms running 30, 40 and 50 years underlie all of these refinancing operations. A reduction of 1½% in the interest and dividend rates prescribed in the obsolete Plan of Reorganization formulated for the Debtor in 1943 would involve an annual saving of $1,539,051 which if capitalized at 3½% would provide additional securities in the amount of $43,974,000—more than enough to make whole the holders of the Debtor's General Mortgage Bonds who under the obsolete Plan lose 90% of their investment.

(*B*) *The permanent establishment of the Geneva Steel Plant.* It is misleading to say, as did the proponents of this obsolete Plan of Reorganization in their presentation to the Supreme Court of the United States that the record of this proceeding shows knowledge on the part of the [fol. 10] Interstate Commerce Commission of the existence of the Geneva Steel Plant at Provo, Utah, at the time it certified the Plan to the District Court.

At the time the record in this proceeding was closed by the Interstate Commerce Commission the development of this great mid-continental steel plant if it had been considered at all was in the blueprint stage. Later on construction was undertaken by the United States Steel Corporation at the request of and for the account of the Government. A year or more afterwards in connection with an uncontested application of the Trustee of the Debtor's estate for leave to make certain interest payments there was a reference by one of the Trustees to this, among other, war projects. What was said was scarcely more informative than would have been the case if the reference had been to the construction of a new canal on the Planet Mars. (Transcript p. 995.) This incident is of value as revealing the quality of the evidence that has been resorted to in the Section 77 proceedings to sustain the forfeiture policy of the Interstate Commerce Commission. The Trustees of the Debtor's estate and the proponents of the Plan

of Reorganization have consistently treated this massive heavy goods industry as a war facility and not as a permanent industrial development upon which to base and measure peacetime traffic potentialities and this was perhaps technically admissible or justifiable at October 23, 1943, when this Court approved the Plan and at November 29, 1944, when this Court gave it final confirmation. It was unknown even at the latter date whether in the end the Plant would be closed down and written off as an expense item of the War or whether it would be sold as surplus property.

After the Plan of Reorganization had been confirmed by the Court the Government decided to offer the Plant for sale as surplus property and in the month of June 1946 the property was acquired by the United States Steel Corpora- [fol. 11] tion which is now in possession. The over-all purchase price is said to have been $47,500,000 plus an undertaking on the part of the purchaser to expend a minimum of $18,600,000 to adapt the Plant to the manufacture of steel products in addition to those for which it was originally constructed. These included structural steel and steel plates up to an annual capacity of 700,000-750,000 net tons. The Debtor submits that the permanent establishment of this mammoth Plant for peace-time ownership and operation by United States Steel Corporation necessarily destroys and renders worthless any estimate of the earning power of the Debtor's properties made at a time when the Plant did not exist and given judicial sanction at a time when it was not known whether the Plant would survive the exigencies of the War.

(*C*) *Post-war National income.* At the time the Plan of Reorganization which the Debtor seeks to set aside was confirmed by this Court the War had not ended either in Europe or in the Orient. There had been no scientific study of the peace-time economy that would be needed to service a National debt already at an undreamed of level and still rising. It was recognized when this proceeding reached the Circuit Court of Appeals that there would be

a post-war economy vastly different from that which existed when the Interstate Commerce Commission developed the Plans of Reorganization which have been subjected to such caustic criticism in the official Reports heretofore cited of the Interstate Commerce Committee of the Senate and the Judiciary Committee of the House of Representatives. The impending economic changes then in process and now a reality are featured in the Opinion of the Circuit Court of Appeals rendered by Judges Huxman and Phillips. It is now recognized that what was then thought to be a wild unrestrained guess as to the post-war National income was in fact a gross understatement. The reasonably anticipated gross income of Debtor's property for the year 1946 will be far in excess of any pre-depression income and on [fol. 12] the basis of any operating ratio heretofore experienced on the property there should be realized therefrom distributable income far in excess of any amount necessary for the service of Debtor's obligations. It is inconceivable that this Court sitting as a Court of Equity would permit the consummation of a Plan of Reorganization for this Debtor which wipes out 90% of the investment of the Debtor's General Mortgage Bonds (more than $43,000,000 if interest at contract rates is computed *pendente lite* without equitable adjustments), the entire investment in the Debtor's Preferred Stock (more than $17,000,000) and the equity investment in common shares held severally in equal proportions by the Missouri Pacific Railroad Company and the Western Pacific Railroad Corporation without opening wide the judicial doors for proof of the changed circumstances which demonstrate the injustices by which these interests are menaced.

WHEREFORE, the Petitioner respectfully prays for an Order of this Court vacating and setting aside its Orders entered herein on October 25, 1943 and November 29, 1944 approving the Plan of Reorganization for the Debtor certified to it by the Interstate Commerce Commission, referring this proceeding back to the Interstate Commerce Commission for the formulation of a New Plan of Reorganization conforming to the requirements under present-day conditions of Section 77 of the National Bankruptcy Act and

granting such other and further relief in the premises as to the Court shall seem meet.

Respectfully submitted,

/s/ William V. Hodges
William V. Hodges
Equitable Building
Denver 2, Colorado

/s/ F. C. Nicodemus, Jr.
F. C. Nicodemus, Jr.
40 Wall Street
New York 5, N. Y.

Attorneys for Petitioner, The Denver and Rio Grande Western Railroad Company

September 17, 1946

Filed United States District Court, Denver, Colorado, Sept. 17, 1946.

G. Walter Bowman,
Clerk.

[fol. 13] In the District Court of the United States for the District of Colorado,

No. 8669

In the Matter of The Denver and Rio Grande Western Railroad Company, Debtor.

In Proceedings for the Reorganization of a Railroad.

Motion of Insurance Group Committee and Senior Indenture Trustees in Regard to Debtor's Motion for Rehearing.

Insurance Group Committee, Central Hanover Bank and Trust Company, Trustee, Guaranty Trust Company of New York, Trustee, United States Trust Company of New York,

Trustee, and The Chase National Bank of the City of New York, Trustee, without admitting that any form of pleading is required with respect to the "Petition of the Debtor for an order of this Court (a) vacating and setting aside its orders of October 25, 1943, and November 29, 1944, etc." (hereinafter called the Motion for Rehearing), but solely to clarify the issues and reserving the right to amplify this motion at any argument or hearing thereon, move that the Court (1) defer any action on the Motion for Rehearing until the Supreme Court shall have acted on the petitions for rehearing now pending before it and, if and when such petitions shall have been denied, (2) enter an order, without receiving any evidence, which (*i*) will deny the Motion for Rehearing on the ground that it does not state a case of such nature as to justify reconsideration of the determinations heretofore made by said orders of October 25, 1943 (approving the Plan of Reorganization) and November 29, 1944 (confirming the Plan), and (*ii*) will grant to the undersigned such other relief as may be proper.

[fol. 14] With respect to (1) above, this Motion is made on the ground that it is not competent or proper for this Court to vacate or change said orders of October 25, 1943 (approving the Plan) or November 29, 1944 (confirming the Plan) until said petitions for rehearing shall have been disposed of by the Supreme Court. With respect to (2) above this Motion, subject to denial of said petitions by the Supreme Court, is made on the following grounds:

(*a*) The order of November 29, 1944 that confirmed the Plan, having so become final, conclusively determines all controversies as to the Plan and conclusively determines the participation of the various classes of security holders and the classes of security holders that shall or shall not participate, so that it is not now competent for the Debtor to reopen any of the issues so determined or for this Court to take any action requested in the Motion for Rehearing.

(*b*) In the alternative, if it be competent for the Debtor to request any reopening of the issues so determined, that could be done only by a Motion for Rehearing, addressed to the discretion of this Court and stating such a case as

would, at the least, make the denial of the motion unconscionable and inequitable. The Motion for Rehearing does not state such a case. On the contrary, considered in the light of:

(*i*) the opinion of this Court delivered October 25, 1943 approving the Plan, the order of October 25, 1943 approving the Plan, the opinion of this Court delivered November 1, 1944 confirming the Plan, the order of November 29, 1944 confirming the Plan and the tenor and effect of the appellate proceedings had thereon,

(*ii*) the whole record in these proceedings, including all papers heretofore filed herein, and

[fol. 15] (*iii*) the matters of which the Court may properly take judicial notice,

the Motion for Rehearing fails to state any such a case as to justify any reconsideration of the determinations heretofore made herein and it should therefore be summarily denied.

Dated October 23, 1946.

INSURANCE GROUP COMMITTEE

By Grant, Shafroth and Toll
Equitable Building
Denver 2, Colorado

Hunton, Williams, Anderson, Gay & Moore
Electric Building
Richmond 19, Va.

CENTRAL HANOVER BANK AND TRUST COMPANY

By Norma L. Comstock
Equitable Building
Denver 2, Colorado

Rathbone, Perry, Kelley & Drye
70 Broadway
New York 4, N. Y.

GUARANTY TRUST COMPANY OF NEW YORK

By Pershing, Bosworth, Dick & Dawson
Equitable Building
Denver 2, Colorado

Davis Polk Wardwell Sunderland & Kiendl
15 Broad Street
New York 5, N. Y.

UNITED STATES TRUST COMPANY OF NEW YORK

By Lindsey & Larwill
Equitable Building
Denver 2, Colorado

Stewart & Shearer
45 Wall Street
New York 5, N. Y.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK

By Lewis & Grant
First National Bank Bldg.
Denver 2, Colorado

Milbank, Tweed, Hope, Hadley & McCloy
15 Broad Street
New York 5, N. Y.

Filed United States District Court, Denver, Colorado, October 26, 1946. G. Walter Bowman, Clerk.

[fol. 16] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO,

No. 8669

In the Matter of THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Debtor.

In Proceedings for the Reorganization of a Railroad.

ORDER DISMISSING PETITION OF DEBTOR FOR AN ORDER OF THIS COURT SETTING ASIDE ORDERS OF OCTOBER 25, 1943, AND NOVEMBER 29, 1944.

This matter having come on to be heard this day on the motion of Insurance Group Committee, filed October 25, 1946, to dismiss the Debtor's petition for rehearing entitled "Petition of the Debtor for an order of this court (a) vacating and setting aside its orders of October 25, 1943, and November 29, 1944, etc." (hereinafter sometimes referred to as "the Petition for Rehearing") and having been argued by counsel, and the Court being fully advised in the premises, and being of the opinion

(a) that the order of November 29, 1944, having become final, conclusively determines all controversies concerning the Plan and the rights of the various classes of security holders to participate, and it is not now competent for the Debtor to reopen those proceedings; and

(b) that the Petition for Rehearing fails to state a case which justifies reconsideration by this Court of the issues already determined;

it is

ORDERED that the Petition for Rehearing be, and it hereby is denied on each of the aforesaid grounds.

J. Foster Symes
United States District Judge

Dated at Denver, Colorado
this 30th day of October, 1946.

Filed United States District Court, Denver, Colorado. October 30, 1946. G. Walter Bowman, Clerk.

[fol. 17] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO,

No. 8669

In the Matter of THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Debtor.

In Proceedings for the Reorganization of a Railroad.

MOTION OF DEBTOR FOR STAY OF EXECUTION OF THE PLAN OF REORGANIZATION HEREIN.

Comes now the Debtor herein and moves the Court to enter an Order staying all further action of any and all parties hereto in carrying out the Plan of Reorganization heretofore confirmed by this Court, including the expenditure of money for the purpose of executing the same, until such time as the appeal from the Order of this Court entered on the 30th day of October, 1946, denying the petition of the Debtor to remand said Plan to the Interstate Commerce Commission shall be taken within the time allowed by the applicable Rules of Procedure and shall have been passed upon by the Circuit Court of Appeals of the Tenth Circuit, and so long thereafter as may be required by the mandate of said Court of Appeals.

That an appeal to the Circuit Court of Appeals of the Tenth Circuit would be ineffective should the distribution of securities before and without consideration by the Interstate Commerce Commission of the changed factors alleged in Debtor's motion to remand the Plan to the Commission for further consideration be made before the disposition of such appeal by the Circuit Court of Appeals of the Tenth Circuit, and the damage to your petitioner would be irreparable. That immediately upon the issuance and delivery of the securities contemplated by the said Plan they may thereafter speedily pass from hand to hand and upon valid consideration and so be purchased by persons who would claim to be innocent purchasers thereof, and the re-

call thereof would involve multifarious claims and litigation [fol. 18] and be in large measure impossible.

Respectfully,

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Debtor.

By William V. Hodges,
Henry C. Vidal,
947 Equitable Building,
Denver 2, Colorado.

F. C. Nicodemus, Jr.,
40 Wall Street,
New York 5, N. Y.

Dated: October 30, 1946.

Filed United States District Court, Denver, Colorado. October 30, 1946. G. Walter Bowman, Clerk.

[fol. 19] ORDER DENYING MOTION OF DEBTOR FOR STAY OF EXECUTION OF THE PLAN OF REORGANIZATION HEREIN.

This matter having this day come on for hearing in open court on the Motion of Debtor for Stay of Execution of the Plan of Reorganization Herein, and the court having heard the arguments of counsel and being fully advised in the premises, it is

ORDERED that said motion be and the same is hereby denied.

ENTERED ON THE DOCKET this 30th day of October, A. D. 1946—G. Walter Bowman, Clerk of the United States District Court, District of Colorado.

[fol. 20] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO,

No. 8669

In the Matter of THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Debtor.

THE DENVER AND SALT LAKE WESTERN RAILROAD COMPANY, Subsidiary Debtor.

In Proceedings for the Reorganization of a Railroad.

NOTICE OF APPEAL.

NOTICE IS HEREBY GIVEN that The Denver and Rio Grande Western Railroad Company, debtor above named, and The Denver and Salt Lake Western Railroad Company, subsidiary debtor above named, jointly, and each of them severally, hereby appeal to the United States Circuit Court of Appeals for the Tenth Circuit from the order entered in this Court on October 30, 1946, upon the petition of the debtor for an order:

(a) Vacating and setting aside its orders of October 25, 1943 and November 29, 1944, approving and confirming the plan of reorganization certified to it by the Interstate Commerce Commission and

(b) Referring this proceeding back to the Interstate Commerce Commission for the formulation of a new plan under subsection (d) of Section 77 of the National Bankruptcy Act,

in the above entitled proceedings.

Appellants specify the following named parties as appellees: John Evans, J. F. Fitzpatrick, Harvey J. Gunderson, Richard K. Paynter, Jr., and Eugene A. Schmidt, Jr., Reorganization Committee under the Plan of Reorganization of The Denver and Rio Grande Western Railroad Company, [fol. 21] Wilson McCarthy and Henry Swan, as Trustees of the property of The Denver and Rio Grande Western Railroad Company, H. Allyn Hicks, Jr., as Trustee of the

property of The Denver and Salt Lake Western Railroad Company, United States Trust Company of New York, Chase National Bank of the City of New York, Guaranty Trust Company of New York, City Bank-Farmers Trust Company, Central Hanover Bank and Trust Company, Insurance Group Committee, Reconstruction Finance Corporation, Moffat Tunnel Improvement District and Commission, the State of Colorado, and the Public Utilities Commission of the State of Colorado.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Debtor,

THE DENVER AND SALT LAKE WESTERN RAILROAD COMPANY, Subsidiary, Debtor,

By W. V. Hodges

H. C. Vidal

F. C. Nicodemus, Jr.

Their Attorneys.

947 Equitable Building
Denver 2, Colorado

Filed United States District Court, Denver, Colorado. October 30, 1946, G. Walter Bowman, Clerk.

[fol. 22] CIVIL BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS, That we, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, and THE DENVER AND SALT LAKE WESTERN RAILROAD COMPANY, as principals, and THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, as surety, are held and firmly bound unto John Evans, J. F. Fitzpatrick, Harvey J. Gunderson, Richard K. Paynter, Jr., and Eugene A. Schmidt, Jr., as the Reorganization Committee under the Plan of Reorganization for the Denver and Rio Grande Western Railroad Company, debtor, Wilson McCarthy and Henry Swan, as Trustees of the property of The Denver and Rio Grande Western Railroad Company, H. Allyn Hicks, Jr., as Trustee of the property of The Denver and Salt Lake Western Rail-

road Company, United States Trust Company of New York, Chase National Bank of the City of New York, Guaranty Trust Company of New York, City Bank-Farmers Trust Company, Central Hanover Bank and Trust Company, Insurance Group Committee, Reconstruction Finance Corporation, Moffat Tunnel Improvement District and Commission, the State of Colorado, and the Public Utilities Commission of the State of Colorado, in the full and just sum of Two Hundred Fifty Dollars, to be paid to the said John Evans, J. F. Fitzpatrick, Harvey J. Gunderson, Richard K. Paynter, Jr., and Eugene A. Schmidt, Jr., as the Reorganization Committee under the Plan of Reorganization for The Denver and Rio Grande Western Railroad Company, debtor, Wilson McCarthy and Henry Swan, as Trustees of the property of The Denver and Rio Grande Western Railroad Company, H. Allyn Hicks, Jr., as Trustee of the property of The Denver and Salt Lake Western Railroad Company, United States Trust Company of New York, Chase National Bank of the City of New York, Guaranty Trust Company of New York, City Bank-Farmers Trust Company, Central Hanover Bank and Trust [fol. 23] Company, Insurance Group Committee, Reconstruction Finance Corporation, Moffat Tunnel Improvement District and Commission, the State of Colorado, and the Public Utilities Commission of the State of Colorado, their heirs, executors, administrators, successors or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors or assigns, jointly and severally by these presents.

Sealed with our hands and dated this 30 day of October, in the year of our Lord, one thousand nine hundred forty-six.

Whereas, lately, at the May Term, A. D. 1946, of the District Court of the United States, for the District of Colorado, in a proceeding pending in said Court for the reorganization of The Denver and Rio Grande Western Railroad Company, debtor, and The Denver and Salt Lake Western Railroad Company, subsidiary debtor, pursuant to Section 77 of the National Bankruptcy Act, an order

was entered on the 30th day of October, 1946, on the petition of the reorganization Committee, for an order:

(a) Vacating and setting aside its orders of October 25, 1943 and November 29, 1944, approving and confirming the plan of reorganization certified to it by the Interstate Commerce Commission and

(b) referring this proceeding back to the Interstate Commerce Commission for the formulation of a new plan under subsection (a) of section 77 of the National Bankruptcy Act.,

[fol. 24] in case No. 8669, in that Court, and the said The Denver and Rio Grande Western Railroad Company, debtor, and The Denver and Salt Lake Western Railroad Company, subsidiary debtor, have taken an appeal to the United States Circuit Court of Appeals for the Tenth Circuit, to reverse said Order in the said Reorganization Proceedings:

NOW, the condition of the above obligation is such that if the said The Denver and Rio Grande Western Railroad Company, debtor, and The Denver and Salt Lake Western Railroad Company, subsidiary debtor, shall prosecute said appeal to effect, and answer all costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,

By Wm. V. Hodges (SEAL)
Attorney-in-Fact

Sealed and delivered
in presence of:

.....

.....

THE DENVER AND SALT LAKE WESTERN RAILROAD COMPANY,

By W. V. Hodges (SEAL)
Attorney-in-Fact

THE FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,

By Sidney Moritz (SEAL)
Attorney-in-Fact

Approved:

.....
United States District Judge

Filed United States District Court, Denver, Colorado, Oct. 30, 1946.

G. Walter Bowman,
Clerk.

[fol. 25]

CLERK'S CERTIFICATE ON SHORT RECORD UNDER RULE 75(j) OF THE RULES OF CIVIL PROCEDURE.

UNITED STATES OF AMERICA
District of Colorado

I, G. WALTER BOWMAN, Clerk of the District Court of the United States for the District of Colorado, do hereby certify the foregoing pages numbered from one (1) to twenty-two (22), both inclusive, to be a full, true and correct transcript and copy of the record and proceedings as designated by counsel under Rule 75(j) of the Rules of Civil Procedure, in a certain case lately in said court pending, entitled In the Matter of THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Debtor, and THE DENVER AND SALT LAKE WESTERN RAILROAD COMPANY, Subsidiary Debtor, Bankruptcy No. 8669, as fully and completely as the same still remain on file and of record in my office at Denver, Colorado.

IN TESTIMONY to the above, I do hereunto sign my name and affix the seal of said Court at the City and County of Denver in said District, this 30th day of October, A. D. 1946.

G. Walter Bowman
Clerk

(SEAL)

Filed, Oct. 30, 1946. Robert B. Cartwright, Clerk.

[fols. 25-26] IN THE UNITED STATES CIRCUIT COURT OF APPEALS

TENTH CIRCUIT

No. 3425

In the Matter of THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Debtor.

In Proceedings for the Reorganization of a Railroad.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Debtor, Appellants,

vs.

WILSON McCARTHY AND HENRY SWAN, as Trustees of the property of The Denver and Rio Grande Western Railroad Company, H. ALLYN HICKS, JR., as Trustee of the property of The Denver and Salt Lake Western Railroad Company, INSURANCE GROUP COMMITTEE, CENTRAL HANOVER BANK AND TRUST COMPANY, GUARANTY TRUST COMPANY OF NEW YORK, UNITED STATES TRUST COMPANY OF NEW YORK, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, CITY-BANK FARMERS TRUST COMPANY, RECONSTRUCTION FINANCE CORPORATION, MOFFAT TUNNEL IMPROVEMENT DISTRICT AND COMMISSION, THE STATE OF COLORADO, PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, AND JOHN EVANS, J. F. FITZPATRICK, HARVEY J. GUNDERSON, RICHARD K. PAYNTER, JR., AND EUGENE A. SCHMIDT, JR., as REORGANIZATION COMMITTEE under Plan of Reorganization for The Denver and Rio Grande Western Railroad Company, Debtor, Appellees.

Appeal from Order Dismissing Petition to Return Plan to The Interstate Commerce Commission.

Filed Oct. 30, 1946. Robert B. Cartwright, Clerk.

Comes now the appellant and respectfully shows:

Heretofore and on the 17th day of September, 1946, the appellant, The Denver and Rio Grande Western Railroad

Company, Debtor, filed its petition in the District Court of the United States for the District of Colorado praying the Court to order the Plan of Reorganization for the appellant, heretofore confirmed by said District Court on November 29, 1944, to be returned to the Interstate Commerce Commission for consideration.

[fol. 27] That thereafter and on or about the 25th day of October, A. D. 1946, all of the appellees save and except Wilson McCarthy and Henry Swan, Trustees, H. Allyn Hicks, Jr., Trustee, the Reorganization Committee, City Bank-Farmers Trust Company, Reconstruction Finance Corporation, Moffat Tunnel Improvement District and Commission, the State of Colorado and the Public Utilities Commission of the State of Colorado, joined in a motion that the petition of said appellant be summarily denied. That on the 30th day of October, A. D. 1946, said motion was heard and said petition was dismissed.

That the appellant, your petitioner, has appealed from said Order and has docketed said appeal in this Court. That the purpose of Debtor's said petition was to secure from the District Court an Order returning said Plan of Reorganization to the Interstate Commerce Commission in order that the Commission might reconsider and take cognizance of changed economic conditions now existing in the nation and in the territory served by the Debtor's railroad property and which have developed since the closing of the record of testimony before the Interstate Commerce Commission on the 20th day of May, A. D. 1941, and which were not ascertainable at that time, and might consider significant legislative and executive action interpretative of Section 77 taken on or about the 3rd and 13th days of August, 1946.

That the primary facts now possible to lay before the Commission are the revelation of postwar economic conditions in the nation, postwar demand for the services of Debtor's property, which demand is in excess of any demand enjoyed pre-Depression, exclusive of any extraordinary demand for the transportation of materials necessitated by the war effort, a material lowering of interest rates for long time hire of money, and of the fair and

reasonable rate for capitalization of normally expected earnings with the consequent increase of fairly determined capitalization in an amount sufficient to satisfy the demands in reorganization of all the Debtor's creditors and leave [fol. 28] a substantial equity for the Debtor.

That an established and definitely provable increase in the demands for the services of Debtor's railroad by newly created industries justifies a further increase of capitalization. That at the time the factual record was being considered by the Interstate Commerce Commission it was not demonstrable that an increase in freight and passenger tariff rates would result in a substantial increase of income for the Debtor because of the threatened loss of business to competitive transportation agencies that might result from such increases. That now the necessity and demand for Debtor's transportation service is so great and the comparative regulation of competing agencies is such that a fair and reasonable increase in the tariff rates for the service of Debtor's property will not result in a substantial curtailment of the demand for such services, and will result in a gross income which will yield a net income more than adequate for the service of Debtor's obligations to its creditors.

That by the legislative and executive action set forth in Debtor's said petition the highest legislative and executive authority has, since the closing of said record before the Interstate Commerce Commission, declared an interpretation for Section 77 which the Interstate Commerce Commission, as the creature of such legislative and executive authority, is obliged to heed and to adopt and to follow the meaning of Section 77 as originally intended by Congress, to the end that no Plan forfeiting the rights of junior creditors and debtors shall be proposed and executed under Section 77.

That said new conditions make relevant and material other matters and things not of sufficient importance hitherto and before the justification for added capitalization became evident to require investigation and determination, but which now require judicial consideration by the bankruptcy court, to wit, the effect of the appropriation

and use of substantially $40,000,000 of distributable income [fol.29] as accounted by the rules of the Interstate Commerce Commission for accounting of railroad operations, plus a further cash realization of approximately $40,000,000 from the consumption and conversion of capital and the withholding of the greater part thereof from the creditors, and the expenditure thereof for the use, benefit and advantage of the creditors, and the improvement of the security for Debtor's indebtedness.

That since the closing of said record before the Interstate Commerce Commission the value and earning power of the stock of the Utah Fuel Company has been actually demonstrated, and that value, which exceeds $5,000,000, is now applicable as a credit on the claims of the holders of the Western Consolidated bonds and in law and equity should be so credited before the distribution of any securities to said bondholders.

That the Debtor's right to have the Interstate Commerce Commission consider the newly developed factors and changed conditions presents an undetermined justiciable question. Such duly demonstrable facts and economic conditions require consideration by the Interstate Commerce Commission for action, which action is thereafter subject to scrutiny by the District Court and subject to judicial review by Federal Courts with appellate authority. And the District Court erred in denying appellant's said petition, thereby depriving appellant of the right to have such newly demonstrable facts and conditions considered.

That it is the purpose and intent of the Reorganization Committee appointed by the court below, and of the court, to execute the Plan of Reorganization with the greatest speed and distribute new securities under the Plan, and without noting thereon or informing those who accept the same that said securities are subject to modification by future action of the bankruptcy court.

That if, on consideration, this Court should reverse the action of the District Court, the appeal to this Court would be ineffective should the distribution of securities before and without consideration by the Interstate Commerce

[fol. 30] Commission of the changed factors above alleged and such appropriate judicial action occur, and the damage to your petitioner will be irreparable. That immediately upon issuance and delivery of the securities contemplated by said Plan they may thereafter speedily pass from hand to hand and upon valid consideration, and so be purchased by persons who would claim to be innocent purchasers thereof, and the recall thereof would involve multifarious claims and litigation and be in large measure impossible.

That your petitioner has applied to the District Court of the United States for the District of Colorado for a stay of the execution of said Plan and said stay has been refused.

WHEREFORE, your petitioner prays an Order of this Court staying the execution of said Plan and the taking of further steps in carrying out the same until the matters and things herein set forth may be properly considered by this Court and by the Interstate Commerce Commission, by the District Court, and by such further review as may be permitted under the laws and rules of procedure of the judiciary, and for further orders in the premises.

Respectfully,

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Debtor,

By Wm. V. Hodges,

H. C. Vidal,
947 Equitable Building,
Denver 2, Colorado.

F. C. Nicodemus, Jr.,
40 Wall Street,
New York 5, N. Y.

Dated: October 30, 1946.

[fol. 31] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
TENTH CIRCUIT

No. 3425

In the Matter of THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Debtor.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Debtor, ET AL., Appellants,

vs.

WILSON McCARTHY and HENRY SWAN, Trustees, ET AL., Appellees.

In Proceedings for the Reorganization of a Railroad.

ORDER.

Upon consideration of the application of the petitioner, The Denver and Rio Grande Western Railroad Company, Debtor herein, for an order staying further proceedings in the District Court of the United States for the District of Colorado in a proceeding in bankruptcy numbered 8669 therein entitled "In the Matter of The Denver and Rio Grande Western Railroad Company, Debtor," to effect the consummation of the Plan of Reorganization for the Debtor's property heretofore and on the 29th day of November, A. D. 1944 confirmed by said court in said proceedings, and good cause having been shown,

IT IS HEREBY ORDERED:

That all proceedings in the District Court of the United States for the District of Colorado to consummate the Plan of Reorganization of the properties of the Debtor, The Denver and Rio Grande Western Railroad Company, and its subsidiaries, be and they are hereby stayed, and that no further action be taken under or pursuant to the Order of the United States District Court for the District of [fol. 32] Colorado herein dated the 29th day of November,

1944, confirming said Plan, and that no further action be taken or Orders entered in said court providing for the taking of any steps to effect the consummation of said Plan until this Court shall dispose of the appeal herein in No. 3425 in this Court from the Order of the District Court of the United States for the Distirct of Colorado in said proceedings numbered 8669 dated the 30th day of October, A. D. 1946, dismissing and denying the motion of the Debtor to return the Plan to the Interstate Commerce Commission for further consideration and pending the further Order of this Court directing its final disposition of the matters and things at issue in this cause.

Petitioner shall promptly file a bond in the amount of One Thousand Dollars ($1,000.00) conditioned that it will pay all costs and damages properly awarded against it because of this appeal.

November 2, 1946.

Orie L. Phillips
U. S. Circuit Judge.

Filed Nov. 2, 1946. Robert B. Cartwright, Clerk.

[fol. 33] CIVIL BOND ON APPEAL.

STAY BOND.

KNOW ALL MEN BY THESE PRESENTS, That we, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, as Principal, and THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, as Surety, are held firmly bound unto John Evans, J. F. Fitzpatrick, Harvey J. Gunderson, Richard K. Paynter, Jr., and Eugene A. Schmidt, Jr., as the Reorganization Committee under the Plan of Reorganization for The Denver and Rio Grande Western Railroad Company, Debtor, Wilson McCarthy and Henry Swan, as Trustees of the property of The Denver and Rio Grande Western Railroad Company, H. Allyn Hicks, Jr., as Trustee of

the property of The Denver and Salt Lake Western Railroad Company, United States Trust Company of New York, Chase National Bank of the City of New York, Guaranty Trust Company of New York, City Bank-Farmers Trust Company, Central Hanover Bank and Trust Company, Insurance Group Committee, Reconstruction Finance Corporation, Moffat Tunnel Improvement District and Commission, the State of Colorado, and the Public Utilities Commission of the State of Colorado, in the full and just sum of One Thousand Dollars ($1,000.00), to be paid to the said John Evans, J. F. Fitzpatrick, Harvey J. Gunderson, Richard K. Paynter, Jr., and Eugene A. Schmidt, Jr., as the Reorganization Committee under the Plan of Reorganization for The Denver and Rio Grande Western Railroad Company, Debtor, Wilson McCarthy and Henry Swan, as Trustees of the property of The Denver and Rio Grande Western Railroad Company, H. Allyn Hicks, Jr., as Trustee of the property of the Denver and Salt Lake Western Railroad Company, United States Trust Company of New York, Chase National Bank of the City of New York, Guaranty Trust Company of New York, City Bank-Farmers Trust Company, Central Hanover Bank and Trust Company, Insurance Group Committee, Reconstruction Finance Corporation, Moffat Tunnel Improvement District and [fol. 34] Commission, the State of Colorado, and the Public Utilities Commission of the State of Colorado, their heirs, executors, administrators, successors and assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Sealed with our hands and dated this 4th day of November, in the year of our Lord, one thousand nine hundred forty-six.

Whereas, lately, in the May Term, A. D. 1946, of the District Court of the United States for the District of Colorado, in a proceeding pending in said Court for the reorganization of The Denver and Rio Grande Western

Railroad Company, Debtor, and The Denver and Salt Lake Western Railroad Company, Subsidiary Debtor, pursuant to Section 77 of the National Bankruptcy Act, an order was made on the 30th day of October, 1946, on the petition of the said Debtor and the said Subsidiary Debtor for an order:

(a) Vacating and setting aside its orders of October 25, 1943, and November 29, 1944, approving and confirming the Plan of Reorganization certified to it by the Interstate Commerce Commission, and

(b) referring this proceeding back to the Interstate Commerce Commission for the formulation of a new plan under sub-section (a) of Section 77 of the National Bankruptcy Act,

in case No. 8669, in that Court, and the said The Denver and Rio Grande Western Railroad Company, Debtor, and The Denver and Salt Lake Western Railroad Company, Subsidiary Debtor, have taken an appeal to the United States Circuit Court of Appeals of the Tenth Circuit to reverse said order in the said reorganization proceedings, which appeal in the United States Circuit Court of Appeals is case No. 3425; and

[fol. 35] WHEREAS the said Circuit Court of Appeals, by its order entered in the said appeal on November 2, 1946, granted a stay of further proceedings to consummate said Plan of Reorganization, and directed the said The Denver and Rio Grande Western Railroad Company to file a bond in the amount of One Thousand Dollars ($1,000.00), conditioned that it would pay all costs or damages, properly awarded against it because of the said appeal;

Now, the condition of the above obligation is such that if the said The Denver and Rio Grande Western Railroad Company shall prosecute said appeal to effect, and answer all damages and costs if it fails to make good its plea, then

the above obligation to be void, else to remain in full force and virtue.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,

By /s/ William V. Hodges (SEAL)
Attorney-in-fact.

Sealed and Delivered
in presence of:

.....
.....

THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

By /s/ Sidney Moritz (SEAL)
Attorney-in-fact.

Approved:

/s/ Robert B. Cartwright
Clerk of United States Circuit
Court of Appeals

Filed Nov. 4, 1946. Robert B. Cartwright, Clerk.

[fol.36] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO SITTING AT DENVER.

Pleas and proceedings before The Honorable J. Foster Symes, Judge of the United States District Court for the District of Colorado, presiding in the following entitled cause:

IN THE MATTER of The Denver and Rio Grande Western Railroad Company, Debtor.
No. 8669.

[fol. 37] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

No. 8669

In the Matter of THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Debtor.

Before: HON. J. FOSTER SYMES, District Judge.

TRANSCRIPT OF PROCEEDINGS ON MOTIONS TO DISMISS PETITION OF DEBTOR TO REOPEN.

Denver, Colorado,
October 30, 1946.

APPEARANCES.

For the Trustees: Henry McAllister, Esquire; John L. J. Hart, Esquire; and Thomas R. Woodrow, Esquire.

For the Debtor Railroad: William V. Hodges, Esquire, and Joseph C. Hodges, Esquire.

For the Insurance Group Committee: Morrison Shafroth, Esquire, and George D. Gibson, Esquire.

For the Reconstruction Corporation: Charles Bromley, Esquire.

[fol. 38] For Reorganization Committee: Montgomery Dorsey, Esquire; Kenneth F. Burgess, Esquire; and Allan R. Phipps, Esquire.

For the Central Hanover Bank and Trust Co.: Miss Norma Comstock.

For the United States Trust Co. of New York: L. H. Larwill, Esquire.

For certain holders of Denver and Salt Lake Western bonds: Ralph L. Carr, Esquire.

For Guaranty Trust Co. of New York: Robert G. Bosworth, Esquire.

[fol. 39] The Court: We have several Rio Grande matters set for this morning, gentlemen. Have you any suggestion as to what order we shall take them up in?

Mr. Shafroth: If the Court please, I suggest that Mr. Gibson's and Mr. Burgess' motions be first heard challenging the sufficiency of the petition which has been filed.

Mr. Hodges: Mr. Burgess' motion is not set. Mr. Burgess' motion is not a motion to dismiss. That is a motion which puts in issue facts which involve a trial of this matter.

The Court: Here is a motion of the Insurance Group and the Senior Indenture Trustees in regard to the petition.

Mr. Hodges: That is the motion that is set for today.

The Court: All right, we will take that up first, then. This is Mr. Gibson's motion?

Mr. Gibson: Yes, Your Honor.

The Court: All right, proceed.

Mr. Gibson: May it please the Court, this has been a long proceeding, as no one knows better than Your Honor. It was almost ten years after the proceedings began that Your Honor, by an order entered on November 29th, 1944, confirmed the plan of reorganization. But the debtor appealed from that order. The appellate proceedings continued through the Supreme Court, and they were terminated by an opinion and order of the Supreme Court on June 10th of this year affirming Your Honor's orders in approving and confirming the plan, and by a further order [fol. 40] of the Supreme Court entered as recently as Monday of this week denying petitions for rehearing. Your Honor this morning has the unusual privilege of sitting on a direct appeal from the final judgment of the Supreme Court. To put it in another way, the debtor, having litigated this case from this Court to the Circuit Court and then to the Supreme Court, is now attempting to start it all over again.

Of course, the reorganization of a railroad is a preeminently practical question, so practical as to raise the

issue in this anomalous motion of Mr. Hodges whether it really was the intention of Section 77 to provide that kind of a merry-go-round for the bar or whether it merely was the intention of the law to reach some final result at some particular time.

The first point I want to present to Your Honor this morning is that it was the intention of Section 77 to do just that—to reach some final result at some particular time—and that time has now arrived by the final adjudication of the order confirming the plan. It is our position that when an order confirming a plan is finally affirmed on appeal, that conclusively terminates the whole controversy and conclusively adjudicates the question of participation under the plan, including every issue that Mr. Hodges seeks to raise again by his petition here—the question of what classes shall and what classes shall not participate under the plan. It follows that it is not now competent for the debtor to reopen these issues, as debtor's motion seeks [fol. 41] to do, and we ask Your Honor so to rule.

But, if, on the other hand, it were competent for the debtor to request a reopening of these issues heretofore determined, then, surely, under familiar practice, that could be done only by a motion for rehearing. The debtor's petition, or so-called petition, that has been filed, is, in fact, just that, both in form and in substance, because it asks Your Honor to modify and vacate the orders heretofore entered approving and confirming the plan and thereupon to remand the proceedings back to the Interstate Commerce Commission. It follows, of course, that the debtor is the moving party here this morning. The Insurance Group Committee and the Senior Indenture Trustees are not the moving parties. We have filed a motion to deny summarily this untimely and anomalous petition of the debtor, but we have done that only as a matter of convenience to clarify the issues for the argument this morning, and because the debtor has required us to do so as a condition to agreeing that the issue might be heard here this morning.

The debtor's motion for rehearing is, of course, to be

considered in the light of the whole record, and that means all of Your Honor's previous opinions and orders approving and confirming the plan and all of the appellate proceedings had thereon. In the second place, it means all papers heretofore filed up to this date in this proceed-
[fol. 42] ing, and it includes, of course, all of those matters of which Your Honor may properly take judicial notice.

Considered in that setting, we submit to Your Honor that this motion of the debtor presents nothing but a stale controversy that has been repeatedly submitted to the Courts before and repeatedly decided against it. But, not only that, the debtor's petition wholly fails on its face to make such a statement of a case as to justify any reconsideration of the issues heretofore determined.

Of course, Your Honor, we wish to give every consideration that is proper to this motion of the debtor, and for our part we should like to have not only a ruling by Your Honor on the legal point I have mentioned, that the final adjudication of a confirmation order concludes the controversy, but also that we might get a ruling from Your Honor on the fac ual point I have just mentioned, that the debtor's petition fails to state such a case as to justify reconsideration of issues heretofore determined. We want that because, among other reasons which the Supreme Court properly gives, to use its own words, the Supreme Court attributes "especial weight" to Your Honor's decision in view of your extensive familiarity with the reorganization. That is the second point we wish to present this morning, the point that the debtor's motion, even if it may be properly considered at all, nevertheless fails to state such a case as to justify any reconsideration of the
[fol. 43] determination heretofore made.

If Your Honor approves those two points, then we shall ask Your Honor that an order be entered which will, without receiving any evidence at all, summarily deny the debtor's motion on the two grounds I have mentioned, and in concluding I shall have a few words to say on the form of suggested order.

But, taking up now the first of those two points, we all recognize that Section 77 has been criticized as affording

excessive or undue opportunities for litigation and delay. But one merit it surely has—that of providing some identifiable time when the controversy closes. The first two sentences of Sub-section (f)—I do not like to read, but I would like to read those two sentences from Sub-section (f) of Section 77, which provide, skipping the irrelevant words:

> "Upon confirmation . . . the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof . . . and all creditors. Upon confirmation . . . the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the Judge relative thereto."

We submit there could be no clearer way to state it, that, subject only to the right of judicial review, a confirmation [fol. 44] order finally determines all questions of participation, including Mr. Hodges' question of what classes shall and what classes shall not participate under the plan, and these words "subject to the right of judicial review" gives special emphasis to that result. Of course, they mean that an order of confirmation may be revised or, indeed, upset on appeal. But they also affirmatively show a Congressional purpose that a confirmation order shall not be reviewed by any other form of proceeding except a direct appeal, and especially not by a proceeding of the kind Mr. Hodges begins here this morning. The language means that when a confirmation order is finally adjudicated and approved on appeal, that closes the controversy.

And there is another indication of the legislative intention to this same effect. As Your Honor knows, Chapter X, providing for industrial reorganizations, contains an express provision that a plan may be modified "before or after its confirmation." A similar provision is contained in the preceding section, Section 77-B. Of course, there is no such provision in Section 77, manifestly. The in-

clusion of such a provision in the industrial statute and its omission from the railroad statute is a strong indication of the Congressional purpose that a finally adjudicated confirmation order closes the controversy in the case of a railroad reorganization.

It is of interest in that connection to note that the policy for finality—a common-sense practical design for reaching [fol. 45] an end somewhere—is so strong that, in the face of these words I quoted from Chapter X, the Circuit Court of Appeals of the Seventh Circuit, in disposing of a case under Section 77-B, which had the same words and was the predecessor of Chapter X, In Re Diversey Building Co., in 1944, said:

> "We cannot accept appellant's interpretation of this Act. We are convinced that Congress did not intend that a debtor corporation should be permitted to ask for a radical change of plan of reorganization after it had been confirmed by the Court and was being executed under the Court's supervision . . . We interpret Sub-Section (f) to mean that changes and modifications after the plan is confirmed refer to such changes as will better aid in carrying out the plan which has been finally confirmed, and not such changes or modifications as will materially alter the property rights established by the decree of confirmation."

We submit to Your Honor that a decree of confirmation is final under Section 77 when no such provision for modification is given.

And no argument can be made against that result by Mr. Hodges on the basis of the third sentence of Subsection (f) of Section 77. I quoted the first two sentences of that sub-section, and the next one goes on to say:

> "The property dealt with by the plan, when trans- [fol. 46] ferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged."

These words, however, speak in terms of a later moment than the confirmation order—that is, the turning over of the properties was, we believe, merely declaratory of the legal situation brought into being by the final confirmation order.

But the most that a debtor could say on that—and we cannot admit that any such statement is a true statement—but the most the debtor could urge is that because the detailed provisions of the mortgages and other corporate papers are not at hand when the confirmation order is entered that the old legal rights will not be modified at law pursuant to the plan until the property is turned over to the reorganized company. But it is still true that the rights of participation, with which alone Mr. Hodges is concerned, are, subject only to any intervening administrative expenses, conclusively fixed in equity. Indeed, there is nothing left to determine with respect to classes, like the stockholders represented by Mr. Hodges, who receive nothing under the plan. It was of no concern to them whether the new mortgages show this or show that, and in neither case do they participate. The situation, in short, is the familiar one where an adjudication in equity conclu- [fol. 47] sively determines all rights of the parties, though the formal modification of their legal rights may be postponed until the time of the execution of the decree. For example, an agreement to sell land may be specifically enforced in equity, and a decree of specific enforcement conclusively settles the whole controversy. It may be true that the former legal title may continue in the promissor under that agreement until the actual execution of the decree.

So we submit that the statutory framework of Section 77 is clear and simple. Has Your Honor taken the final action of the sort that Section 77 authorizes? There can be no doubt about that. In Your Honor's confirmation order, the Court spoke in terms of unmistakable finality, and if I may quote from a few of them, that will be apparent. Paragraph B says in part:

> "The provisions of the plan and of this order shall forthwith become and be, and are hereby declared to be, final and binding upon the debtor and the sub-

sidiary debtor, and all of their respective stockholders, including those who have not, as well as those who have, accepted the plan, and all creditors." That is on page 11482 of the printed court proceedings.

Paragraph D in the same confirmation order says:

> "The rights of all stockholders and creditors of the debtor and the subsidiary debtor and of all other [fol. 48] parties in interest shall be only those provided by the plan."

The next paragraph, Paragraph E, says:

> "The debtor, the subsidiary debtor, and any new corporation organized to receive the properties of the debtor or the subsidiary debtor upon the consummation of the plan be, and each of them hereby is, authorized and directed, and shall have full power and authority, to take all steps, and do all things, necessary on its or their part to put into effect and carry out the plan and the orders of this Court relative thereto."

And finally, in Paragraph I, at page 11484 of the printed court record:

> "This order shall become, and it is hereby declared to be, effective immediately upon its entry in this proceeding by the signature of the Judge of this Court."

So, in summary, we submit that Section 77 clearly contemplates that a confirmation order shall be in final form, and, when put in that final form, it finally concludes the controversy. Your Honor's order confirming the plan was unmistakably in such final form, and its final affirmance by the Supreme Court lays at rest all issues that have been raised here, and it is not now competent for the debtor to reopen those issues by any form of new proceeding. We ask Your Honor that the debtor's motion be denied on that ground, as to the first of our two points.

[fol. 49] In addition, we ask Your Honor to hold, as I have said in my introductory statement, that the debtor's petition wholly fails to state such a case as would justify reconsideration of the determinations heretofore made in the

orders that approve and confirm the plan. Of course, for that purpose we look at the words of the motion, to see what they say.

Section 1 of the debtor's motion talks about the interests it represents, and they are, if anybody at all, clearly the holders of the old stock. There is a reference to unsecured creditors, but that is not now important, whether the debtor represents those creditors or not, because they have been held likewise to have no interest in the plan and do not participate in it. The debtor also passes on the third class, and also claims to speak for the holders of the general mortgage bonds, and I quote:

> "If by reason of the limitations of Section 77 . . . they may not be lawfully and fully represented in this proceeding by City Bank Farmers Trust Company as mortgage trustee."

There cannot be any question but what a mortgage trustee may lawfully and fully represent the interest of its bondholders. That is what its job is to do. It can do it much better than the debtor can, who is an obligator on the bonds and thus has a conflicting interest. So, in short, the debtor speaks only for the old stock, if for anyone, [fol. 50] and it is of interest that the City Bank Farmers Trust Company, whose conduct and diligence have been beyond praise in the prosecution of every permissible step for the protection of its bondholders, has filed no such paper as this unfounded and anomalous motion by Mr. Hodges.

Section 2 of the debtor's motion indicates that the main premise of the whole argument to Your Honor is a change of economic conditions affecting reorganization values,—that is, a change for the better—a bigger and better future. But, at this point, that statement in the pleading is only by way of a general flourish, and I will deal with it specifically when I come to that specific point later asserted in the motion.

You may note in Section 3 a misstatement of the record. The claim is made that the record was formally closed on May 20th, 1941. If there is some mysterious virtue that

the word "formally" possesses, that is not a misstatement, but otherwise it is. However, the statement is made that the record was formally closed on May 20th, 1941, but Your Honor well knows and the Supreme Court knew that the record contained the transcript of hearings held in October, 1942, and in April, 1943, and, further, as the opinion of the Supreme Court recites, the current earnings statements were also before the Commission. But, apart from that misstatement of the record, Section 3 repeats only this general flourish about the wonderful future that lies ahead of us, and it blends with that an insinuation that all prior applications of Section 77 have now been in- [fol. 51] validated just by the discussions that accompanied the unsuccessful effort to amend Section 77 by the last session of the Congress. That is not a new idea of the debtor. Far from it! That insinuation was developed at great length as the main basis for the debtor's petition for rehearing in the Supreme Court, and that petition for rehearing was denied just this week. We may take it that the Supreme Court is a qualified spokesman on this matter, and that nothing now remains for Your Honor to consider or determine. The Supreme Court's mandate to Your Honor directs that further proceedings be forthwith had in this cause in accordance with and, in effect, to carry out its opinion affirming the approval and confirmation of the plan.

And it is significant also to mention this. The debtor has readily recognized the meaning and effect of such a mandate. It has repeatedly sought to postpone the date when the mandate should come down. First of all, they went to Mr. Justice Reed, without notice to us and asked—and I might say that the rules permit that to be done—and asked that the mandate be stayed for a particular time. Mr. Justice Reed granted such a stay. Once again the debtor similarly went to Mr. Justice Reed with a similar request, and a similar result, but when they went before Mr. Justice Reed at that time he said, as I am told, although I was not there, "If you gentlemen have a third plea of this kind, I should like to see notice given to the other side." The time went on, and at a time when I [fol. 52]was in the woods of New Hampshire trying to avoid work, the debtor asked a further stay, and notice

came to me, and I went to resist this stay in oral argument before Mr. Justice Reed. I knew nothing of the state of affairs of Your Honor's agency, the reorganization committee, and the progress that they had made. I did not think it proper that the Court should be asked to act on general hypotheses and arguments, and I informed counsel that I should telegraph to Mr. Burgess, who knew all the facts, and ask him if he would not supply a letter setting out the concrete situation then existing before the reorganization committee and what its plans were, in order that, if Mr. Justice Reed should consider this third application for a stay, he should have all of the facts before him. Mr. Burgess wrote such a letter; in which he pointed out the various steps that had to be taken and that were being taken by the reorganization committee, and in terms made it clear that it was their resolve, if possible, to consummate the reorganization plan, both as to the Rio Grande and as to the Salt Lake, before the end of December. I read that letter, word for word, to Mr. Justice Reed, and he asked or directed that it be made a part of the record. So it was on that record that the third application for a stay was denied, and it was on that record that the mandate I have referred to was dispatched to Your Honor, and finally it was on that record on the day before yesterday that the Supreme Court denied all petitions for rehearing.

[fol. 53] But let me come back to the next section of this motion of the debtor. That is Section 4. That is the real heart of the debtor's motion. The orders approving and confirming the plan, the motion asserts, should be vacated because of three changes in relevant conditions, and they are very interesting changes, as I shall point out. The first is a decline in interest rates—a decline in interest rates! Next is the Geneva steel plant, and finally there is what the motion calls "a permanent elevation of the national income." That may seem a strange phrase in today's conditions, but they are quoting "a permanent elevation of the national income." We may take these briefly in that order.

First, on the interest rates, that argument about interest rates was one of the main bases on which the debtor

asked the Supreme Court to reverse Your Honor's action in confirming the plan. The debtor urged that the going rate of money for railroads had declined from four per cent provided in this plan—and let me divert there just for a moment—this four per cent that is bandied about so casually refers to a first mortgage bond on which the coupon is three per cent fixed and one per cent contingent. But, apart from that, the debtor's argument was that the going rate for money for railroads had declined from four per cent to a level of three per cent, and that, even if reorganization values were to be determined by earnings—and that concept [fol. 54] was not popular with the debtor—a complete reorganization was required by that circumstance. In support of that assertion, the debtor asked the Supreme Court to take judicial notice of all recent railway financing and reorganization, and a total of twenty issues of all sorts were set out in its brief. But the Supreme Court made short work of that contention, and in rejecting it the Court said:

> "We note also the contention that the possibility of a national income much higher and interest rate much lower than before World War II should affect valuation based on prospective earnings. Those factors, we think, were before the Commission when it made its earnings estimate."

And then, again, dealing not in terms of what was before the expert administrative agency but what the Court thought itself, the Supreme Court said:

> "Nothing that respondents have called to our attention indicates any improvement in economic conditions or prospects in July, 1944, or any date since, over June, 1943, the date of the Commission's approval of the plan, which would justify a treatment different from that accorded the claimants in 1943."

That is a decisive rejection in terms of the Supreme Court's own direct views of the argument based on interest rates, as well as the income argument, which I shall come to later.

Then, unconvinced by this decision of the Supreme Court, [fol. 55] the debtor renewed the same contention in its

petition filed July 2nd, 1946. Indeed, at that time the asserted decline was said to be one and one-half per cent, instead of the one per cent that they had been claiming in February, or, in other words, the whole amount now claimed in the present motion. The denial of that rehearing on the basis of that petition constitutes, we respectfully submit to Your Honor, a decisive and final rejection of that argument.

So, look at this situation. They come back into Your Honor's court with the same argument which was twice submitted to and twice rejected by the Supreme Court. The debtor renews that contention here, in spite of a double rejection by the Supreme Court, and in view of a marked upward trend in interest rates since the Supreme Court spoke on June 10th. In other words, the tide has been running in a direction opposite to that asserted by the debtor's motion.

Your Honor may have noticed the market quotations, as the Supreme Court itself did in this particular proceeding, and I should like to comment upon a few, though not many. When the opinion of the Supreme Court was handed down on June 10th of this year, the Dow-Jones average of the ten first-grade rails was 117.25. On October 18th it was 110.25,—a decline of seven points in first-grade rail bonds average in that period. Of course, that deterioration is even more acute in the case of second-grade rails, where the average declined from 100.61 to 89.79. Those figures are from the Commercial and Financial Chronicle, which is, of course, a standard reporting service.

Turning now from these general averages to the particular situation of the Rio Grande itself, Your Honor may note, as the Supreme Court did, the "when issued" market quotations for the new securities. When the Supreme Court handed down its opinion on June 10th, the bid for the new Firsts was 101, and for the new Incomes it was 79. On October 21st, the corresponding figures were 89½ and 51¾, a decline of 11½ points in the new Firsts and a decline of 27¼ points for the new Incomes.

What does that have to do with yield, that the debtor talks about? When the Supreme Court acted, the current

yield was 3.94 per cent. On October 8th, which was not quite the same date as I have used for these other figures, but not significantly different, the current yield was 4.44 per cent. Mr. Hodges would have Your Honor believe that four per cent is an extortionate sum for these new First Mortgage bonds. People who are betting their money in the market, at least, think that 4.4 per cent is the going rate for a security of that nature and quality. On the new Incomes, at the time of the Supreme Court decision on June 10th, the current rate of return, based on the market, was 5.45 per cent, and it is now 9 per cent. Now, of course, [fol. 57] those figures are based upon yield maturity basis rather than current yield, so it would be higher than I have stated.

So, based on this asserted decline in interest rates, the debtor's motion wholly fails to state any case justifying reconsideration.

Now, what is the next point? It is the Geneva steel plant. That is not a new conception, either. It was repeatedly and vigorously pressed on the Supreme Court all through these proceedings. The debtor's main brief, or its opening brief, on February 15th, 1946, said this plant "is certain to be revolutionary in its contribution to the new earning power of debtor's properties." Of course, we all appreciate the importance of the Geneva steel plant. Everyone welcomes it in the territory. But we all equally know that that kind of a statement is exaggerated. But, in any case, on that basis, the debtor urges to the Supreme Court that the plan should be upset just because of Geneva, and it was urged again by counsel in the oral argument with the assertion that the record was barren of evidence on that point. That is a mistake. In fact, counsel for the debtor in a hearing before this Court in October, 1942, at which Mr. Hodges was personally present and representing the debtor—and I might digress for a moment to say that the transcript was duly certified to the Interstate Commerce Commission and referred to it by the Commission—and in [fol. 58] that hearing Mr. Swan got on the stand and testified about the construction and size of the Geneva steel plant, and it was his evident contemplation that the Geneva steel plant would continue operation after the war and

would make a sizeable or substantial contribution, or, indeed, a large contribution, to the earnings of the road. So, there was, in point of fact, adequate basis on which the Commission could appraise the future in this respect, but that is wholly unimportant now. Whether it be true or not, the Supreme Court has said that the argument in respect to the Geneva steel plant is no reason on which Your Honor's approval and confirmation of the plan could be upset.

So here again, we submit, the debtor's petition wholly fails to state a case justifying reconsideration of the determinations heretofore made.

There is only one other argument in debtor's motion, and that is the argument of the greater prosperity for the present and the long-term future. Nor is this a new conception, dealing, as the motion would indicate, with changed conditions in the country. One of the main bases of debtor's arguments before the Supreme Court was this very question, and I am quoting from its original brief of February 15th, which said:

> "There are other new factors which permanently elevate earning power to a level far above that which could possibly have been estimated."

And that the whole national income will be greater for the [fol. 59] future. But the Supreme Court rejected that argument in words which I have already quoted, pointing out first that these factors, as the Court declared, were before the Commission when it acted, and then holding—and this is, I believe, of such importance that I hope Your Honor will permit me to quote it once more—

> "Nothing that respondents have called to our attention indicates any improvement in economic conditions or prospects in July, 1944, or any date since, over June, 1943, the date of the Commission's approval of the plan, which would justify a treatment different from that accorded the claimants in 1943."

Going beyond that, on this point, the Supreme Court took judicial notice of the petition that had been filed by all the railroads before the Interstate Commerce Commission

for an increase in freight rates on April 15th of this year, and the Supreme Court quoted quite liberally from that petition as to the critical situation of the railroads in view of the great increases in wages and the great increases in costs of fuel and other materials and supplies, and the decline, both in physical volume of traffic and volume of revenue from operations. In speaking of that, the Supreme Court observed with respect to the property now in Your Honor's custody: "The Denver apparently did not vary greatly from this overall picture," and then added: "Even before the transportation difficulties of 1946, it was [fol. 60] obvious that the Commission's judgment was being confirmed by events."

There cannot be any serious suggestion that there has been an improvement in the economic situation or outlook since the decision by the Supreme Court on June 10th of this year, or since the earnings period considered in the Court's opinion. In evidence of its conclusion which I have quoted, the Supreme Court took judicial notice of the interim earnings reports of the railroads for the months of January and February of this year, and pointed out that the operating revenues for that period were eighteen per cent below the corresponding period of 1945. The earning figures through August of this year show that the operating revenues through August of this year were thirty-five per cent under the corresponding period of 1945. The operating ratio is a significant commentary on that situation.

The evidence in the record indicates that for the first eight months of this year the operating ratio was approximately eighty-six per cent, and the corresponding figure for the first eight months of 1945—the very comparison the Supreme Court invites—was sixty-one per cent, or slightly less than that. For the first eight months of 1944, immediately preceding the hearing before Your Honor on the confirmation of the plan, the operating ratio was slightly less than sixty-nine per cent. Today, in other words, or for the first eight months of this year, the operating ratio is eight points above, eight percentage [fol. 61] points above, what it was in the corresponding period just before Your Honor confirmed the plan.

Now, what about the other side of the picture? What about costs? I do not suppose Mr. Hodges can seriously suggest to Your Honor that there has been a decline in operating costs since the Supreme Court spoke on June 10th. Quite to the contrary! Everybody knows, and Your Honor may take judicial notice, that there has been a current and severe increase in pertinent cost levels. But one thing Your Honor will recall, and may properly take judicial notice of, effective as of January 1st of this year, wages were increased by 17.85 per cent above the 1945 level. While the effective date of that change was before June 10th, when the Supreme Court spoke, its impact is accentuated by the subsequent enactment of the Crosser bill on July 31st, 1946, increasing the payroll tax deductions from three and one-half per cent to five and three-quarters per cent, effective as of January 1st of this year, and raising the increase to six per cent on January 1st, 1949, and further raising it to six and one-quarter per cent on January 1st, 1952.

Your Honor, I submit, may also take judicial notice of the United States Department of Labor cost-of-living index as an official publication of the Government—it is the Consumers' Price Index I am referring to—and this indicates an increase of only 2.4 per cent in 1944, substantially at the time of the confirmation, to January 1st of this year, when they increased 11.9 per cent during the period from [fol. 62] January 1st of this year to September of this year, and the index, 889 series, indicates increases during the same periods of three per cent and 22.6 per cent.

It is perfectly clear, we submit, there is nothing in the suggestions on that point by the debtor, which is the last point in its petition, and the debtor's motion wholly fails to state any such case as would justify a reconsideration of the determinations heretofore made. We, of course, respectfully submit that the whole motion should be denied summarily. No motion of that kind, so patently wanting in merit, could serve any purpose except mere delay by opening up the issues and permitting the introduction of testimony. It is in the public interest that this reorganization be speedily consummated, and the creditors are entitled to have that done. From every practical point of

view, therefore, we submit that the petition should be denied now without the receipt of any testimony on the two grounds that I have mentioned.

Now, if Your Honor will permit, I should like to submit a proposed form of order that will accomplish just that.

Mr. Burgess: Your Honor, the reorganization committee desires to support the position that Mr. Gibson has taken and has presented so ably, and it might perhaps be orderly for me at this time very briefly to speak on behalf of the reorganization committee, unless Your Honor would prefer [fol. 63] that I follow Mr. Hodges.

The Court: No, I don't think so. I will hear you now. Do you prefer to go ahead now, Mr. Hodges, or later?

Mr. Hodges: Mr. Burgess, on behalf of the reorganization committee, has filed a motion here which tenders issues of fact, which requires a trial, but that is not set for this morning. I shall be very happy to listen to Mr. Burgess in support of the motion of Mr. Gibson to dismiss this proceeding, which is here for hearing this morning.

Mr. Gibson: It is a motion to deny, not to dismiss.

Mr. Burgess: I think Mr. Hodges misapprehends the nature and substance of the motion that was filed in behalf of the reorganization committee, and I will speak of that at the conclusion of my remarks. However, I will address myself to our support of Mr. Gibson's position at this time.

Mr. Hodges: That will be entirely satisfactory.

The Court: When was your motion filed?

Mr. Gibson: It was on October 25th, Your Honor, and the motion, Mr. Dorsey advises me, on behalf of the reorganization committee was filed on October 28th.

Mr. Burgess: Mr. Phipps says it was filed on the 29th.

The Court: I don't seem to have it here.

Mr. Burgess: I will hand Your Honor a copy of it, that you may wish to examine later, but I will address myself presently to this other matter and refer to that in conclusion.

[fol. 64] You will note that the motion recites simply that, since the Supreme Court has already heard the petitioner on these same points and decided against the petitioner, and since the points are patently without merit, we submit that this Court should deny the debtor's petition for rehearing as wholly wanting in merit and in substance, which is clearly an issue of law and not of fact, as Mr. Hodges seems to infer. However, I want at this time to support Mr. Gibson's position, if I may.

Mr. Montgomery Dorsey and I appear as counsel for the reorganization committee. The reorganization committee has not thus far participated in any of the proceedings before this Court except the matter of submitting the Salt Lake consolidation to a vote.

The plan, Your Honor recalls, provides that a reorganization committee shall be created which shall carry out the plan under the supervision of the Court. The duty, therefore, of the reorganization committee is a single duty, which is simple—to carry out the plan, this particular plan, under the supervision of the Court, and this Court, in its turn, is acting under a very definite mandate, the mandate of the Supreme Court of the United States, a mandate which was issued under date of August 27th of this year, which recites in part and directs in part as follows:

> "It is now here ordered and adjudged by this Court that the judgment of the said United States Circuit [fol. 65] Court of Appeals in these causes be and the same is reversed with costs; the orders of the District Court for the District of Colorado of October 25, 1943, approving the reorganization plan herein, and of November 29, 1944, confirming the plan, are affirmed.
>
> "It is further ordered that these causes be and the same are hereby remanded to the District Court of the United States, for the District of Colorado, for further proceedings."

These further proceedings that are to be had in accordance with the laws of the United States obviously refer to the provisions of the Bankruptcy Act under which this plan was approved and confirmed.

It is provided that, among other things, upon confirmation of the plan, subject only to the right of judicial review, which has already been had, that the plan shall be binding upon the debtor, the stockholders, the creditors, and, further, that upon confirmation of the plan the debtor shall have full authority and power to carry out, and shall put into effect to carry out the plan and the orders of the judge relative thereto.

Therefore, we have here this morning three entities, each of which is charged by law with the single duty of putting into effect this plan. These entities are the Court and the reorganization committee and the debtor. However, one of these entities, the debtor, is presently attempt- [fol. 66] ing not to put the plan into effect, but, instead, to prevent it being put into effect, and, obviously, the reasons which the debtor is advancing for so extraordinary a course, in direct conflict with the mandate of the law, must be scrutinized with a most critical eye. The reorganization committee, on its part, charged as it is with the single duty of putting this plan into effect, also conceives it to be its correlative duty to resist the efforts of any others who seek to prevent the plan from being put into effect. That, of course, does not mean that the reorganization committee, if it were confronted with some great fundamental change in underlying facts, should proceed in utter disregard of it. On the contrary, in those circumstances, the reorganization committee should inform itself and advise the Court in respect to any such changes. But here, however, the reorganization committee, after very careful investigation and consideration of the debtor's petition for rehearing, has concluded that the debtor's petition for rehearing is simply a reiteration of the matters and things that have been hashed and rehashed for the past several years. Second, we feel that the petition is wholly wanting in merit on its face.

Third, we feel that it is in conflict in its assertions with plain facts as they are judicially known to this Court.

Fourth, we say that it can be presented only for purposes of delay.

Fifth, that it is in conflict with the statutory duties [fol. 67] that rest upon the debtor to put this plan into effect and to cooperate in so doing.

In conclusion, as stating the position of the reorganization committee, permit me to refer to a somewhat companion case that has also been very recently passed upon by the Supreme Court of the United States. I refer to the reorganization proceedings affecting the Chicago, Milwaukee, St. Paul and Pacific Railroad Company. Last winter some of the parties in that proceeding representing certain junior interests undertook to get the District Court sitting in Chicago to retain jurisdiction in that proceeding on the representation that Congress was about to pass some laws which might change the rights of the parties. A motion to dismiss that petition was filed and the District Court dismissed the petition. An appeal was taken to the Circuit Court of Appeals, and a motion was filed in that court for an order dismissing the petition. It was heard before Judges Evans, Sparks and Lindley, and on May 17th, 1946, the petition was dismissed. In that decision the Circuit Court of Appeals has made one very significant observation. The Court said:

"In the light of these facts—"

and the facts that are referred to are facts showing a decline in earnings of railroads generally and of the Milwaukee Railroad in particular—the Court said:

> "In the light of these facts, and the further signifi- [fol. 68] cant fact that the peak of the railroad's recent spurt in financial prosperity is now behind it, and serious financial and other problems vex and perplex it, we feel one would have to be an 'incorrigible optimist' to believe that the District Court should have retained jurisdiction of this already accomplished reorganization in the hope (1) that Congress would pass certain legislation, although it has failed to approve prior similar proposals, and (2) if it did, that the condition of the railroad would so improve as to give to appellants revitalized stock."

The moving parties in that proceeding then appealed, and a writ of certiorari on the petition was denied by the Supreme Court of the United States on October 14th of this year.

In other words, not only do we have a denial of the petitions for rehearing in this Denver and Rio Grande case on the day before yesterday, but we have the denial of a petition in a companion case in which similar, and perhaps even broader, allegations were made than are here made.

So, we say to Your Honor that on the face of this petition of the debtor, and in the light of the facts, of which Your Honor may take judicial notice, and especially in the light of the duties that rest upon all of us under the statute, this petition should be forthwith dismissed.

(Thereupon, a short recess was taken.)

[fol. 69] Mr. McAllister: May it please Your Honor, I have considered the position of the trustees in this case as neutral. I shall not make any comment on the argument that has preceded this, but I think that certain facts as shown by the record in this case ought to be before the Court. These are the comparative statements of net revenue from railway operation in the eight months ending with August, 1945, and the eight months ending with August, 1946, as shown by the reports filed in this case.

For the first eight months of 1945 the net revenue from railway operation was $20,447,000, in round figures, and for the eight months ending with August, 1946, it was $4,564,000. In the eight months ending with August, 1945, the net railway operating income was $8,688,000, and for the eight months ending with August, 1946, it was $1,982,000.

That is all I wish to say.

Mr. Hodges: You say those are filed in the record?

Mr. McAllister: They were filed in the record in this case.

Mr. Hodges: When were they filed?

Mr. McAllister: They were filed on Monday.

Mr. Hodges: And those are now in the record, you say?

Mr. McAllister: They are right in the record. Those figures appear in the monthly reports filed in this case.

The Court: Do you wish to proceed now with your [fol. 70] argument, Mr. Hodges?

Mr. Hodges: Yes, Your Honor.

The Court: Very well.

Mr. Hodges: May it please the Court, you will recall that the debtor filed two petitions in this case. One was a petition asking that the plan be referred back to the Commission, and the reasons for that were stated in the petition. The other was a petition asking for an allowance to cover the expense of procuring witnesses to try the issues presented by that petition.

You will recall that after the preliminary setting we came before Your Honor, counsel representing all parties who cared to come, and Your Honor set for the 17th of this month the petition asking for an allowance for witness fees and expenses, and you set for about the 7th of November, as I remember, the hearing on the petition to remand or return the plan to the Interstate Commerce Commission.

Thereupon, not at our solicitation and not upon any conditions prescribed by us, we were asked by the Insurance Group Committee if we would consent to have this matter heard on this 30th day of October on a motion to deny the petition or dismiss the petition grounded upon objections to its sufficiency. At the same time, it was not formally agreed but merely suggested that we might, in connection with the argument on this petition, should the [fol. 71] Court deny the motion to dismiss the petition, ask for an allowance for witness fees, and it was commented upon between Mr. Shafroth and myself that if this petition should not be dismissed the time for a hearing and the taking of relevent testimony should be subsequently determined and we should have adequate time because of the delay which is brought about by that situation. That is why we are here, on that agreement and that understanding.

A comment has been made about our representation. We thought we represented everybody interested in a just and proper plan whose interest is not specifically cared for by someone appearing at this proceeding. But we may be wrong. I think we are right.

A comment has been made upon the fact that under Section 77(f) it is the duty of the debtor to participate in the carrying out of this plan, and that we are faithless to our duty. That is a very amusing observation. This Section 77 provides that when, in a proper way, a plan is ready for execution the debtor shall execute it, and the debtor will never decline that responsibility, if it is not by-passed, as has been done in this and nearly all other cases, through the influence of senior creditors—the debtor is by-passed and it is not allowed to perform the duties that are imposed upon it by Section 77, and a management committee is organized to carry out the plan. So be it! But when the debtor is by-passed and given no opportunity and no responsibility, it is hardly consistent to charge it with a [fol. 72] failure of duty because it is not here pressing for the carrying out of the plan, and the plan is such that they think it is not a just plan and is not in accordance with the law, notwithstanding full faith, credit and accord to the decision of the Supreme Court on the certioraries that were directed to the two orders, the order of approval and the order of confirmation.

I am not going to make the argument that I have made before you so many times, to no avail. The Supreme Court says that the decision of this Court sustaining the interpretation which the Interstate Commerce Commission has given to Section 77, or allowing the Interstate Commerce Commission to make that interpretation, and following along with the Interstate Commerce Commission's idea of what is fair and equitable and in the public interest under their interpretation of Section 77, the Supreme Court says that is all right. But I take great satisfaction—and it is only personal as yet, because it has yielded no fruit for my clients—but I take great satisfaction in the fact that the able members of the House Judiciary Committee, and the House Interstate Commerce Commission, and the whole body of the Senate, and over two-thirds of the members of Congress, approved, step by step, the basic position which I have taken. That will not influence this Court, but it should influence the Interstate Commerce Commission, which is the creature of that Congress, and when it is sup- [fol. 73] ported by the memorandum of the Chief Execu-

tive of this nation saying that he agrees with these provisions, and it is only because he thought the act excluded somebody that should otherwise be included, and because he thought and believed that there was no other provision providing for the control of the railroads—a provision which exists, and has existed for a long time, in the laws covering the Interstate Commerce Commission. So I can only take that satisfaction.

I am not going today to admit that all that the distinguished gentlemen representing the Insurance Group and all the distinguished gentlemen representing the managing committee have to say factually has any place in this argument. The question here is, what does this petition state? What are we talking about now?

There is one point involved in this reading of the statute, Section 77, which counsel makes. There is every ground in the world for a refutation of his argument and a contrary holding under the circumstances of this case. He says that under Section 77(f), when an order confirming the plan is final and that order is no longer subject to further review, that ends it and nothing can be done about it. I submit to Your Honor that is not so. That very section proceeds to define a final decree in these bankruptcy proceedings. It says:

> "Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees and making such provisions as may be equitable [fol. 74] by way of injunction or otherwise and closing the case."

As to the general orders in bankruptcy, Section 49(v), after providing that various orders of confirmation, and so forth, shall be sent down to the Commission, (v) then enumerates the final decree.

The order of approval and the order of confirmation are interlocutory orders and they are subject to the power of this Court as a court of bankruptcy to be modified or altered until the date of the final decree, subject to the inherent power of a court of equity to see to it that on the date of its final decree that which it has done shall be nothing less than equity and justice.

There is a peculiar condition here under this Section 77. Your Honor will remember that in the earlier case, either in the Western Pacific or the Milwaukee, Justice Frankfurter used the words—"The Commission and the Court are brigaded." Well, it is pretty hard to know exactly what that means when you use such indefinite language, but there is a brigading. Now, this Commission interprets its powers under the statute, taking one of several possible interpretations, and it then determines what is fair and equitable, and it then determines what is in the public interest, and submits that plan to Your Honor. That is an administrative act, and all through all of the cases that have been considered there sticks out like a thumb the fact that the Supreme Court is treating it as an administrative [fol. 75] act, and wants that administrative body to take every responsibility that is possible—they don't want to be bothered with the matter—and in that way, and for that reason, you will find language in their decisions, which is now coming to a head, emphasizing the powers of that Commission.

That plan comes to Your Honor, and Your Honor has done what the Supreme Court says you should do. You have taken it, and you have studied it, and you have approved and confirmed it. It does not represent and is not supposed to represent anything more that would be in the process of the foreclosure of a mortgage. But it is out of your hands and it is in the hands of that Commission until the plan is formulated, but after that plan is here the Commission can act no more until the Court sends it back. And that is the result of this brigading. But it makes it necessary for this Court to hear and determine what the constitutional duty of the Commission is, and to permit the Commission to function in the performance of that duty. Otherwise, the brigading has fitchered that process, and a complete determination upon hearing of the things that ought to be heard is not possible.

But in this petition we are presenting to you a matter which must be sent to the Commission for them to act upon. Your Honor cannot tell what sort of a plan would evolve. Your Honor cannot tell whether any changes would be made. But Your Honor can submit it to the Commission

[fol. 76] for them to perform their functions. But I will come to that more in detail.

Now, again, under this Section 77 of the Act, if it was contemplated that after the order of confirmation had been finally settled upon, that it was no more than an interlocutory order, but that it was a final order, why in the world would they put this in, this Section (g)—"If, in the light of all of the existing circumstances, there is undue delay in a reasonably expeditious reorganization of the debtor, the Judge in his own discretion or on motion of any party in interest, or on his own motion after hearing, and after consideration of the recommendation of the Commission, may dismiss the proceedings." What right have you got to dismiss it, if this order of confirmation, however solidified by judicial action, is anything more or less than an interlocutory order?

They talk here about the delay, the years and years of delay. If it could do any good, I would propose to Your Honor right now that you dismiss these proceedings and let these senior creditors abide by their bargain and go forward with their foreclosure. I stand for that as a lawyer and as a citizen. But why these ten years' delay? Because, so far as I can see, for the first time in the history of our jurisprudence, the Congress tried to put cap and gown on a Commissioner of the Interstate Commerce Commission and tell him and tell me that he can make a new contract for me with my creditors. And I resent it. I do not believe any citizen in this nation should stand for that until he has [fol. 77] fought it to the very finish. That is the principle upon which I proceed, and that is the principle and that is the reason why there have been ten years' delay, and, Heaven knows, it should be ended! Now, that has been my fight here, and I do not apologize for it. I am happy to fight for that principle. Repeatedly in the reports of the committees of Congress, both House and Senate—reports which have matured in legislation, voted for and passed by the entire Congress—the answer was always given as between speed and confiscation on the one side and delay and justice on the other, but nothing can be said for delay and confiscation. So much for that.

Now, what Your Honor has before you now and has had for some time is an administrative plan from the Interstate Commerce Commission. There is one thing that has been said. The Supreme Court has been just as generous and just as liberal as it can be in giving free scope to the imagination of the Commission. But you have a plan before you, and that was formulated on a record actually closed in 1941. Now, we did have a hearing here on a collateral question, and Mr. Swan testified, as he always does, directly and clearly, and on that application for the payment of interest he had something to say about the Geneva plant, but at that time the Geneva plant was being operated under Government regulations. It required services, and there was a necessity for the equipment to handle its demands, but even [fol. 78] Mr. Swan did not know and could not testify that the Geneva plant with its great earnings would outlast the war. And when it came before the Commission, if they even looked at that testimony—they say it was sent down to the Commission—it was a trivial matter at that time, because in the way they were looking at things then the Commission could say, "Well, we just estimate and guess that there won't be any change in that situation." But today, factually, there is a change in that situation. Today that plant is in private ownership and in private operation, and it has its significance. But that is a radical change. Now, let's see what the Commission did. They sat in 1941, and they were allowed to sit in 1941 and substantially say that the recently experienced business activity in this country was going to be permanent. We are criticized because we use in this petition the word "permanent" when related to the business activities of today. Speaking as of that time, the Court has allowed them to guess and prognosticate, and then, when the war earnings came in, they were allowed to say, "Well, this is not significant. What is this? This is just more earnings. This is not any change in the basic economy, but it is just more earnings, and earnings, high or low, are not significant. We are looking for the basic business activity, and we project and tell you that after this war that basic business activity that we have assumed is going to continue." The Supreme Court said, "All right, [fol. 79] you can guess at that, and we will take your guess, and nobody can guess any better." But today that

guess is proving false, and the very basis of the rationale used by the Commission on this plan is wiped out like that.

Now, we come back to a consideration of the Atchison case—the case of the Atchison, Topeka and Santa Fe against the United States in 284 U. S., and I am going to begin my reading of it at page 258. Now, let me state this case as I understand it. I may not get the parties right because I do have difficulty in retaining.

Before the depression a very elaborate investigation was made by the Interstate Commerce Commission of the roads, I think in the western classification, but, of course, it wouldn't matter whether it was the west or the east. They held the matter for some months, and maybe some years, and finally the depression having come upon us, the Commission handed down its opinion and its order establishing rates. On February 18th, 1931, the railroads filed a petition with the Commission for a rehearing, and the substance of their petition will be referred to in the quotations from Justice Hughes. The petition was denied by the Commission, and the Court was then asked to enjoin the Commission, for the reasons that are stated by Justice Hughes in his opinion. He says.

> "The petition set forth the passage of the Hoch-Smith Resolution and the order of the Commission in [fol. 80] relation to the rates on deciduous fruits from California, which had been held by this Court to be invalid because based upon an erroneous construction of the Resolution, and the carriers charged that, in making the reports and order here in question, the Commission had proceeded upon a like misconception of its powers. Stating the substance of their petition for rehearing, the carriers further charged that the denial of that petition, in view of changed conditions, was itself an abuse of administrative discretion and, by depriving the carriers of the hearing to which they were entitled, constituted a denial of due process in violation of the Fifth Amendment of the Constitution of the United States."

That is stating the contention of the railroads that they were entitled as a constitutional right to a rehearing based

on the changed conditions, to which reference will be made later in this opinion. The opinion continues:

> "In their answers, the United States and the Commission denied that the action of the Commission was in any respect unauthorized or unlawful, and on the contrary alleged that the Commission had carefully considered the evidence before it in the light of its experience and that the evidence fully supported its order.
>
> "On the application for an interlocutory injunction,—"

—that is where they applied to the Court for an injunction enjoining the order of the Commission because the Com-[fol. 81] mission had refused to recognize this constitutional right—

> "On the application for an interlocutory injunction, the evidence taken before the Commission was not presented to the District Court. Affidavits were submitted by the carriers which were addressed to the effect of the order upon their revenues. The District Court made findings of fact, reciting the findings set forth in the report of the Commission and, in the view that these were conclusive in the absence of the evidence, and that no errors of law had been committed, the application was denied.
>
> "The appellants contest this conclusion, contending that the report of the Commission and concurring opinions of Commissioners disclosed that the Commission had misapprehended its authority under the Hoch-Smith Resolution and that the Commission had failed to make the findings which were essential to support its decision under the applicable law; that this was shown by the special and extended consideration given by the Commission to the depression of agriculture and the lack of other and proper foundation for the order; that the Commission had not performed its duty to consider and apply the provisions of Paragraph 15(a) of the Interstate Commerce Act and had exceeded its power by resorting to different

standards from those established by Paragraphs 1 and 15 of the Act; and that the ultimate finding of the Commission, expressed in the words of the statute, [fol. 82] that the existing rates were unreasonable to the extent that they exceeded the rates prescribed, was not in itself sufficient to support the order, as it otherwise appeared to have been erroneously based.

"We do not find it to be necessary to consider these contentions, and the counter arguments advanced on behalf of the Commission, or to review the Commission's reports, as it is sufficient for the present purpose to deal with the fundamental question presented by the action of the Commission in denying the appellants' second application for a rehearing. Ordinarily, a petition for rehearing is for the purpose of directing attention to matters said to have been overlooked or mistakenly conceived in the original decision and thus invites a reconsideration upon the record upon which that decision rested. The second petition for rehearing, in this proceeding, was not of that character. It was of the nature of a supplemental bill. It presented a new situation, a radically different one, which had supervened since the record before the Commission had been closed in September, 1928. It asserted that whatever might be the view of the order when made, and upon that record, a changed economic condition demanded reopening and reconsideration. The carriers insisted upon this reopening as a right guaranteed to them not only by the Act of Congress but by [fol. 83] the Constitution itself.

"There can be no question as to the change in conditions upon which the new hearing was asked. Of that change we may take judicial notice. It is the outstanding contemporary fact, dominating throughout and action throughout the country. As the Interstate Commerce Commission said in its recent report to the Congress, 'a depression such as the country is now passing through is a new experience to the present generation.' The Commission also recognized in that report 'the very large reductions in railroad earnings which have accompanied the economic depression,' and

stated that 'the chief cause of these reductions has been loss of traffic.' For 'in such depressions the railroads suffer severely. Their traffic is a barometer of general business conditions.'

"It is plain that a record which was closed in September, 1928—relating to rates on a major description of the traffic of the carriers in a vast territory—cannot be regarded as representative of the conditions existing in 1931. That record pertains to a different economic era and furnishes no adequate criterion of present requirements. While the effects of the widespread economic disturbance have had a progressive manifestation, they had been sufficiently revealed in February, 1931, when the second petition for rehearing was made, to compel the conclusion that the record of 1928 [fol. 84] afforded no sufficient basis for the order of the Commission. The facts were set forth in the carriers' petition. They pointed out the grave reductions, in traffic and earnings, from which they were suffering, that their net operating income for 1930 was over $100,000,000 less than their average annual net operating income for the five years preceding, and that their credit was seriously impaired. At the time of this petition, the order revising the rates on grain and grain products in the Western District had not yet become effective, but the Commission stood upon the record of 1928 and, without reopening the proceeding or taking further evidence, provided that its order should become effective on June 1, 1931. In justification of this course, it is urged on behalf of the Commission that its determination had been reached after regularly conducted and protracted hearings in which carriers and shippers had cooperated and that the adjustments related not only to the level of rates but to the relation of rates and to discriminatory and wasteful practices, and that a reopening would have meant further lengthy proceedings. It is said that 'in performing its legislative function of prescribing reasonable rates, the Commission necessarily projects into the future the results of a decision based on the conditions disclosed in the record,' and that its determination 'cannot reflect accurately fluctuating conditions.' These sug-

[fol. 85] gestions would be appropriate in relation to ordinary applications for rehearing, but are without force when overruling economic forces have made the record before the Commission irresponsive to present conditions. This is not the usual case of possible fluctuating conditions, but of a changed economic level. And the prospect that a hearing may be long does not justify its denial if it is required by the essential demands of justice.

"We are thus brought to the fundamental considerations governing the authority of the Commission. It has broad powers and a wide extent of administrative discretion, with the exercise of which, upon evidence, and within its statutory limits, the courts do not interfere. The important and salutary functions of the Commission to enforce public rights are not to be denied or impaired. But the Commission, exercising a delegated regulatory authority which does not have the freedom of ownership, operates in a field limited by constitutional rights and legislative requirements. Its duty under Paragraph 1 (5), 3 (1), and 15 (1) of the Interstate Commerce Act with respect to the prescribing of reasonable rates and the preventing of unreasonable or unjustly discriminatory or unduly preferential practices, has not been changed by the Hoch-Smith Resolution. Ann Arbor R. Co. v. United States, 281 U. S. 658, 669. The legal standards govern-[fol. 86] ing the action of the Commission in determining the reasonableness of rates are unaltered. In the discharge of its duty, a fair hearing is a fundamental requirement. Interstate Commerce Comm. v. Louisville & Nashville R. Co., 227 U. S. 88, 91. In the instant proceeding, the hearing accorded related to conditions which had been radically changed, and a hearing, suitably requested, which would have permitted the presentation of evidence relating to existing conditions, was denied. We think that this action was not within the permitted range of the Commission's discretion, but was a denial of right. The order of the Commission which was thus made effective, and the ensuing supplemental order, cannot be sustained.

"The order of the District Court refusing an interlocutory injunction is reversed, and the cause is remanded with direction to grant the injunction as prayed."

There could not be a clearer picture of what the situation is now and what we have a right to have the Interstate Commerce Commission consider. This Court cannot consider here and say whether there will be a change in the plan or there will not be a change in the plan. That is a question for the Interstate Commerce Commission, and no man can tell them what to do. You can tell them, yes, that they must change the plan, but they do not have to change it. Your Honor suggested a change to them at one time, and they exereised their prerogative and disregarded [fol. 87] your suggestion. That is their responsibility.

Now, what in the light of these changed conditions? What is the view of these committees in Congress? Your Honor is familiar with those reports. You know that one after another of the members of the Committee incorporated in their report the recommendation that this plan should come back for furtl.er consideration, and I want to quote the language of Mr. Mahaffey, who is the high priest of reorganization on the Interstate Commerce Commission. This is taken from Report No. 1170 in the Senate, 79th Congress, Second Session, at page 21. Mr. Mahaffey is quoted in there as saying:

"The changes in credit conditions have now made those four per cent First Mortgage Bonds of the roads covered by Section 20(c) such that they generally can be readily refunded when the property is back in solvent condition. If they can be refunded at, say, three per cent, that of itself, as Mr. Purcell indicated, affords a basis for an increase in capitalization, because the total of the fixed charges is one of the important elements in fixing the capitalization. That and other changed conditions in these cases probably should have consideration where they can be shown to have changed to an important extent. It was with that in mind that I said, 'If you are convinced, as I think you might well be, that these changed conditions

[fol. 88] should be looked into and evaluated, you might like by statute to send the proceedings in which you find them back for further consideration.' ''

But that is not in a statute. It is not yet a statute. It needs the recognition of the Court of the Commission's place in that picture, of the duty of the Commission, because of this brigading.

The Court: We will adjourn at this time until two o'clock.

(Whereupon, at the hour of 12:15 o'clock, p. m., the hearing stood in recess.)

[fol. 89] Pursuant to recess, the hearing was reconvened at the hour of 2:00 o'clock, p. m., October 30, 1946, whereupon the following proceedings were had:

The Court: All right, Mr. Hodges, you may proceed.

Mr. Hodges: Reference was made that Section 77(b) has an express provision that after confirmation the Court may modify the decree. I submit that was merely a reaffirmation and restatement of the rule as to the inherent power of the bankruptcy court or a court of equity to modify any decree that it might have made up to the time of its final disposition of the case. That argument and those considerations go to moves to change the Court's decrees on the record made or upon newly discovered evidence in support of the record made, but they do not go at all to the problem of an application to the Court, however written up or however designated, but in its essence as was designated by Mr. Justice Hughes as in the nature of a supplemental bill. It is a bill filed containing matter which might be presented in one way or another.

Now, I call your attention to a case in 153 Fed. (2d), at page 296, which is a decision by the Circuit Court of Appeals of the Second Circuit, and I call it to your attention because of the long list of citations which is given in Note 2 on page 299, in support of the proposition that

no order in a bankruptcy proceeding is final, in the sense [fol. 90] that it cannot be reopened, until the proceeding has been terminated. There is a long list of cases cited, and the leading case is the case of *Wayne United Gas Co.* vs. *Owens-Illinois Gas Co.*, 300 U. S. 131, which I have here, a case in which the Supreme Court established the proposition that a bankruptcy proceeding which had been dismissed could be reopened, and they discussed the rule which I have laid down, and it is not conceivable that these inherent powers of the Court and the inherent rights of the litigants could be denied by any language used in Section (f) or by Section 77 of the Bankruptcy Act.

Now, in this opinion of the Supreme Court in the D. & R. G. case we have some interesting language which I will read to you. That case was decided June 10th, 1946, and no modification of that opinion was rendered on the recent Monday. I assume that it would not be improper for me to say that I have a telegram stating that the Chief Justice and Justice Jackson were not present at the original hearing of the D. & R. G. case and did not participate in the denial. Justice Frankfurter filed on that most recent date his dissenting opinion.

On that point, I might suggest that on the petition for rehearing the debtor presented matters which my friend Mr. Gibson referred to—I couldn't hear him, but that was my fault and not his—but I have no reason to think that he did not correctly state what the petition said—in good faith the debtor presented to the Court an opportunity on [fol. 91] rehearing to consider matters which were not in the record before them and at the time of their decision. There is no assurance or presumption that they will consider those matters and consider anything else than the record upon which they based their original decision, and the fact that they did not on an application for rehearing branch out into a consideration of some matters, particularly the legislative situation, and give a decision on it, is of no consequence or significance whatever. It is like a petition for a writ of certiorari in that respect. The Court does not need to give heed, and its refusal to consider is not in any sense a ruling upon the question which they had discretion to consider but did not consider.

Now, I will come back to the decision of June 10th, which is the opinion of the Supreme Court in this case. I have what I suppose will be the Supreme Court official copy of the opinion, and I am reading from page 18. The Court said:

> "Assuming that the courts, as courts with equity powers in a bankruptcy matter, might set aside a plan, fair and equitable when adopted by the Commission, merely on account of subsequent changes in economic conditions of the region or the nation, it should not be done when the changes are of the kind that were envisaged and considered by the Commission in its deliberations upon or explanations of the plan" of the Commission. That is the end of the quotation, and [fol. 92] the words "of the Commission" are not a part of the quotation.

You will note that this Commission envisaged the war which was beginning. They were asked to envisage a higher level of business activity in the United States following the war. It was, according to the Supreme Court, the function of the Commission to do the envisaging or the guessing. Obviously, they had taken the position that a few fluctuations in earnings without change in basic economic conditions do not disturb their assumption of basic economic conditions. There was no demonstrated change of basic economic conditions before the Commission, and the Court leaves that open for a proper presentation at the proper place and time of changed economic conditions. That is done by the Court in the opinion affirming the order of this Court confirming the plan of reorganization.

I am going to state to you what I think and believe and submit is a correct statement of the situation today after this decision. The effect of unanticipated change of economic conditions after confirmation and the propriety of action by the reorganization court to protect the interests of junior creditors also has not been judicially determined finally.

The Court: Who said that? What are you quoting from?

Mr. Hodges: I am not giving that as a quotation. I am giving that as my statement of what I conceive to be the status of that question today before the courts of the United States.

[fol. 93] Now, we have made and filed a petition here in which we set forth, we think adequately, and we assert and we tell this Court that there has been a change in economic conditions and a basic change in economic conditions. Without waiving the presentation of all significant features of the change, we set forth some two or three specific features of the change. That is the pleading and that is the statement of fact upon which this hearing turns.

Reference has been made to factual matters not set forth in this petition. I challenge them all, but they have no place here in this hearing.

The Court: They are in the record in the case. I suppose we can review this whole record, can't we?

Mr. Hodges: The facts that have been stated here today are not in the record.

The Court: Such as what, specifically?

Mr. Hodges: Such as the Dow-Jones averages, and what they call the fluctuation in interest rates, and things that directly are intended to contradict the allegations of this petition. I believe Your Honor can examine the whole record in this case, but in examining particularly this report that Mr. McAllister called your attention to, I object that that is factual matter filed ex parte, not in response to this petition, upon which we have had no right of cross examination or analysis. It is there, but it must be exam-[fol. 94] ined with those very essential things in mind, and if it tends to dispute any allegation in this petition it cannot be considered a traverse of the facts set forth in this petition because it comes before the Court in that way. Before that report is to be considered we ask a hearing and an opportunity to analyze it and find out why, if there is any significance to any of the figures, the figures happen to be as they are.

Now, in this petition we say:

"The vital equity power hereby invoked is the power to do justice to any and all parties in interest at any stage of the proceeding and to prevent the entry of, or to vacate and set aside, a decree or determination which may be unfair, inequitable or unjust by reason of the discovery of new evidence or by reason of changed circumstances or a fundamental alteration of economic conditions"—that is what is referred to by the Supreme Court—"or by reason of any new factor or substantial change of a former situation or status which causes such decree to be one of doubtful propriety and calculated to disturb and distress the conscience of the Court. In the opinions of the Supreme Court of the United States rendered March 15, 1943, in the case of *Ecker* vs. *Western Pacific Railroad Corporation and others*, and in the case of *Group of Institutional Investors* vs. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, and also in the opinion of the Supreme Court of the United States rendered [fol. 95] June 10th, 1946, in the proceeding in which this petition is filed it is recognized that a change in economic conditions may require a re-examination into the present fairness of a plan of reorganization previously formulated by the Interstate Commerce Commission and approved or confirmed by the Court.

"3. By order or decree dated October 25, 1943, this Court approved, and by order or decree dated November 29, 1944, confirmed a Plan of Reorganization for the Debtor which had been certified to it by the Interstate Commerce Commission on June 14, 1943, and which was based upon a record formally closed on May 20, 1941. In the period between May 20, 1941, when the record in this proceeding was closed by the Interstate Commerce Commission, and August 13, 1946, when the President of the United States published the Memorandum of Disapproval of S.1253 which had been presented to him on August 1, 1946, pursuant to Section 7 of Article I of the Constitution of the United States, there have occurred in the United States of America and in the section or territory thereof served by the railways and facilities of the Debtor a series of changes

in the National economy, in the railway industry and in the earning power of the Debtor's properties and in legislative and executive action since the confirmation of the plan interpretative of what is 'fair, equitable and [fol. 96] in the public interest' which have completely undermined the foundation and the philosophy of the plan of reorganization for the debtor certified by it to this Court on June 14, 1943, and in consequence thereof said plan is not now, if ever it was, a fair and equitable plan conforming to the standards and requirements prescribed by Section 77 of the National Bankruptcy Act.

"4. The petitioner, without limiting or restricting the scope of this petition as embracing all changes in the national economy and in the railway industry and in the earning power of the debtor's properties, hereby specifies the following as factors which should be fully explored in an open hearing before finality may properly be accorded a plan of reorganization for the debtor formulated as early as June 14, 1943, upon a record closed as early as May 20, 1941:

"(a) The decline in money rates to a level far below the rates prevailing at these dates;

"(b) The recent public offering by the Government and purchase by private capital for private operation of the steel plant at Geneva, near Provo, Utah, which had been constructed by the Government in the exigencies of the war at a cost in excess of $200,000,000;

"(c) A permanent elevation of the national income through intensified industrial activity involving for the indefinite future a greatly increased demand for railway [fol. 97] transportation.

"Each of these factors which will be elaborated in its order under a distinguishing caption alone is sufficient to render obsolete, unfair, inequitable and unjust a plan of reorganization developed on the basis of pre-war standards and pre-war data and that taken collectively they create a presumption of obsolescence so nearly conclusive that a Court of Equity could not properly ignore it."

And then we set forth in detail an affirmative statement of the decline in money rates, and I will not read that all in detail, but it sets forth the decline in money rates and the cases in which the Interstate Commerce Commission authorized securities to be issued and sold at rates of interest reflecting a decline in interest rates. That decline in interest rates, we say, if recognized in new securities of this company will increase, on the basis of the estimate of income used by the Commission on the old record of $43,974,000, the available securities for distribution.

Then, reference is made specifically to the Geneva plant and the fact that not until now, or subsequent to the making of the record and subject to the confirmation of this plan by this Court, and subsequent to the hearing in the Supreme Court, the Geneva plant has become permanently subject to private ownership and operation, and that in itself is a vital thing in affecting the income of the Denver and Rio Grande.

[fol. 98] Then, Paragraph (c) is the post-war national income, that is set out specifically. All through these proceedings it has been contended before the Commission that, predicated upon the known facts, the gross income of railroads bears a fairly constant statistical relation to the national income, and that they should forecast the earning powers of a railroad with reference to a forecast of the national income. That they have not done. Now, the national income is here. It is a fact. Now, the basis which they have been assuming was the depression income, gross income, as the standard of income for the future of this road. Now, that foundation is gone, and there is actually here a new level of national income, the result of the regearing of the economy of this country, and there is an allegation in here that "the reasonably anticipated gross income of debtor's property for the year 1946 will be far in excess of any pre-depression income, and on the basis of any operating ratio heretofore experienced on the property there should be realized therefrom distributable income far in excess of any amount necessary for the service of debtor's obligations." Those are the allegations as to the change in the national economy. They are as effective allegations and as significant as the allegations in the Atchi-

son case to which I called Your Honor's attention this morning. There isn't anybody around who is not aware of the fact that the national income and the national economy are on a level undreamed of heretofore.

[fol. 99] Now, you can say to me, "But I am interested in the net of this railroad." We make no allegation as to the net of this railroad. We make the allegation as to the gross, which will exceed any gross income that this road has enjoyed pre-depression.

The Court: The ability to pay interest on new securities depends upon the net and not on the gross, does it not?

Mr. Hodges: Yes, you know that is true, but that is not the answer.

The Court: I think that is an important factor.

Mr. Hodges: No, that is not the answer at all, any more than it was the answer when we were piling up money here in the war period, earning two or three or four times our fixed charges. What was their answer then to that? They said, "Oh, no, that is temporary. That does not reflect the economic level. No, that is exceptional." Now, we are talking about the economic level. What is the significance of that economic level? I know what their operating ratio is today. I know what the operating ratio of other railroads is. I know of one railroad in the country that has got a higher operating ratio, just one. I know a lot of railroads in the country that have had less decline in gross and a much better operating ratio. I know one railroad that has got a less decline in gross and a greater operating ratio. [fol. 100] But that does not mean anything. Now, what is the situation?

When we talked during the depression about this national economy—it wasn't discussed much before the Court but it was discussed before the Commission—and about the earning power, it was perfectly obvious that we were talking to a Commission that had the powers of the Government to increase the rates for services of the railroad. That we know as a part of the knowledge of the law of the land. But in that day of very deficient national business, it was quite obvious that an increase in the rates would be

more than offset by the loss of a critical part of the business, because a small loss was very critical in those days of poverty of supply and demand.

Now, what is the situation? If this was before the Commission today, would they tell us, when we have got this share of this national income, and the power to give us compensation for that service equivalent to the compensation which other activities in the economy are receiving, that they will refuse us that compensation and confiscate us? They no longer have the excuse that to give us adequate compensation will deprive us of business which will reduce our revenue more than the increased revenue derived from the rates, and when that time comes before the Commission, through the combination of two orders if they do not give us relief—one, the order confiscating us, and the other the order denying us rates—we have got a beautiful case of [fol. 101] confiscation. That is the fact of the matter, and that is the significance of this change in the economy, and the question is not whether today on this volume of business we are making a net. The question is, on this volume of business, compensated equivalently with the compensation for other services in this economy, we will then have a net which will permit us to take care of a fair and reasonable interest charge or preferred stock charge on our property. That will be the question then. It is a new question, and it is not a question that they have had before them before.

Now, there are people that say, "Suppose I sit back and see what happens? Yes, we are doing a lot of business. Yes, there is a great demand for our services. Yes, we are a useful transportation unit in this nation. Yes, we are in fine condition. Yes, we can do it as economically as anybody else, or pretty close to it. But what difference does that make? We are going to pay the high wages and high material costs and we are not going to have any adequate compensation for those services." Is that the picture? Is that what the change in national economy means? Of course, it isn't. Perhaps our whole economy is going into collapse, but that is not an assumption which the Court can make. We have got this high wage problem, and I doubt not but when we look at the annual report for 1945 we will find reflected there very conspicuously the increased labor cost.

[fol. 102] One picture is that it is a permanent impairment of our earning power, and as for another picture, I would like to give to you in just one sentence—I find that an Englishman can state things so well, and this is a statement by the Right Honorable Herbert Morrison in the English cabinet—he has got the same situation there that we have here, and the unions are forcing high wages and the Government has given them high wages over there. But, let's see how he characterizes it. Maybe he is right. He says: "Some may be disturbed about what they regard as a tendency to buy industrial peace at the cost of wage increases which have yet to be matched by extra productivity." In other words, their high wages there are a sight draft on the future productivity of the new wage situation. We have got to expect that that will be the answer here. But, with the basic economy, and the basic activity in business, and the basic demand for the services of this railroad, which it is now fulfilling but which it could not fulfill if it were not for the investment by these people who are being wiped out, the situation is that the cloth is there now to cut, but it was not there when this record was being considered by the Commission in the formulation of the plan which Your Honor has confirmed. We are entitled to ask the Commission—they are the experts in this matter—we are entitled to ask, "Now, if the foundations are all gone, if your basis of reasoning is wiped out, and the things that you imagined have not materialized, and something else quite different has materialized, now, gentlemen, members of the [fol. 103] Commission, what are you going to do about this situation, which is a vital change in the economic conditions?"

So, I believe that we have the right to present to this Court this petition, a supplemental bill in nature, asking that the cause be referred to the Commission for them to give consideration to these changed economic conditions, which the Supreme Court has reserved for consideration, from the opinions in these cases. I thank you.

The Court: Does anyone else want to argue in favor of this motion before we hear replies? Do you want to be heard, Mr. Shafroth?

Mr. Shafroth: Yes, Your Honor, very briefly.

The Court: All right.

Mr. Shafroth: It seems to me that Mr. Gibson so thoroughly covered the matter this morning and has so completely in his original argument answered the contentions now made by Mr. Hodges that it would be a waste of Your Honor's time to reply to Mr. Hodges. The arguments that have already been so effectively presented by Mr. Gibson so thoroughly demonstrated that there is nothing in this petition justifying a reconsideration of the orders already made in this case.

I might say briefly that it seems to me that Mr. Hodges' arguments rest on two fundamental theories. The first is the theory that the law itself is wrong, and second, his theory that Your Honor and the Supreme Court were in error in failing to give sufficient consideration to the [fol. 104] economic conditions which he says exist.

It is very important that this matter be expedited. It has been in the court for ten years. If there ever has been a thorough consideration of a case and a complete determination of the matters here presented, it has occurred in this case, and when the Supreme Court on Monday handed down its final order denying a rehearing, it seems to me that that was a mandate to this Court to proceed with all expedition to carry on the reorganization called for in the plan that had been provided by the Interstate Commerce Commission, and approved and confirmed by this Court and affirmed and approved by the Supreme Court of the United States.

There is pending a further motion before Your Honor today involving the question as to whether or not the trustees should pay the expenses of expert witnesses whom Mr. Hodges desires to bring out for a further hearing on this motion.

The Court: That motion is not before the Court today, is it?

Mr. Shafroth: That is a motion set for today, I believe.

Mr. Hodges: It is set, Your Honor, but I did not refer to it because I thought we were only to speak to the matter under discussion.

Mr. Shafroth: I am not attempting to argue that. I [fol. 105] am just saying that if Your Honor deems that there is nothing justifying a reconsideration of these former orders in this case and a sending back of this matter to the Interstate Commerce Commission, it would be a supererogation to have an argument and a discussion as to whether witnesses should come out for a hearing that was not to be had.

It therefore seems to me important to have this matter disposed of as soon as possible and avoid further delay and further unnecessary argument.

The order that we submitted to Your Honor has one correction, in which we made an error in putting the date as the 28th instead of the 29th. If Your Honor will note in the third line, where it specifies the filing of the reorganization committee's motion herein as October 28th, that should be October 29th.

That is all, Your Honor.

The Court: Is there anyone else to be heard?

The Court feels that this matter must be decided sometime and the litigation ended.

The Court has had long experience with the affairs of this railroad. This is the second receivership since I have been on the bench. That was an equity receivership in 1920, and, as I recall it, the railroad came out of that receivership with a burden of fixed charges and debt larger than when it came into the court for reorganization.

[fol. 106] The earnings of this railroad as shown by the record are very illuminating to me. The inability of this railroad to earn and pay interest on the large debt it has had to support is the crux of the whole situation. Boiled down, this is an attempt by holders of securities wiped out under the plan to get new securities in place of those eliminated by this reorganization plan.

According to the Supreme Court, the best test to be applied in a railroad reorganization in fixing the amount of securities that may be issued under any plan is the net earnings of the property over a given period of years. In addition to the figures given by Mr. McAllister this morning, I have some figures here showing that in 1943 the total operating revenues of this property was $46,646,000, and in 1945 they had increased to $52,360,000, and in 1946 to date, the current year, they are $33,148,000.

Now, after deducting from these amounts the expenses of operation the road had in 1943 a net operating income of $11,996,000, and in 1945, $8,688,000, and in 1946 to date, $1,982,000.

This shows to my mind that the large revenues this road temporarily enjoyed during the war period are a thing of the past and cannot be counted upon in the future or used as a basis to support any increase in the amount of securities over that the property will be called upon to [fol.107] sustain under the present plan of reorganization.

I have often thought that, had I known at the time the plan was approved a year or more ago that the operating expenses, particularly the item of labor, had not reached a peak but would be greatly increased, as they have since that time—and to date there is no indication that they will not be increased in the future, and the probabilities are they will be—I doubt very much if I would have been justified in approving this plan without a further permanent increase in revenue, which is not the case.

In other words, the present earnings will not sustain this financial structure unless there is a change in the income situation. The earnings have been steadily falling off ever since the conclusion of the war and it shows the large revenues were temporary and due to war activities alone.

So, I fail to see any ground upon which it can be said that the earnings of this property will justify the issuance of any further securities. If they were issued they would be absolutely valueless because of the inability of the property to earn or pay any return thereon.

There are other factors that affect the earnings of this property. A reference has been made, for instance, to the Geneva plant, which has been discussed here this morning, and with which we are all more or less familiar. The Geneva plant is not yet in full operation, and I don't know [fol. 108] when it will be. But, assuming that it will be under its new management, it is the estimate of the traffic department of this property, based on discussions with the Geneva people that the gross revenue of the Denver and Rio Grande connected with the Geneva plant will approximate $1,682,000 annually on the basis of present rates and the contemplated production, if the full ex parte 162 freight rate increases requested are granted. On the basis of a 75 per cent operating ratio and after allowance for taxes at present rates, this would make a net income to the Rio Grande of approximately $300,000 a year. Against this, however, must be charged the loss of long-haul traffic on steel and steel products from the East which the road would lose, which heretofore has moved to the West Coast territory from the CF&I and eastern or Pittsburgh plants. In other words, any increase in revenue from the Geneva plant would be in part, at least, offset by the loss of traffic from the Colorado Fuel and Iron Company and other steel establishments in the East whose product would be replaced on the Pacific Coast by the Geneva plant product, so it would not amount to much of an increase in net income.

Another factor is the coal traffic. We all know that the coal traffic still represents the Rio Grande's most important single item of traffic. In that respect, we cannot overlook the fact that the Rio Grande's gross revenue from coal has been on a sharp decline during the period from 1921 [fol. 109] to 1941, dropping from $7,224,000 to $3,810,000, or 47 per cent.

Then, another factor, of course, that we must consider is the transcontinental traffic. It is a fact with respect to this property that it is now more of a bridge railroad than it is a railroad moving business originating or consigned to points on the Rio Grande. That is to say, every year the amount of business that it receives on its eastern connec-

tions and carries through and delivers to its connection at the west is increasing at the expense of the local business.

Now, during the war the railroads have had an advantage due to the closing of the Panama Canal. Some observations on that situation, I think, are in point. Fifty per cent of the nation's transcontinental traffic moved through the Panama Canal in 1940. Due to the war and the closing of the Canal this profitable business was shunted to the railroads. It must be assumed that resumption of normal shipping operations through the Canal will mean that these transcontinental carriers by water will regain at least a substantial portion of their pre-war traffic at the expense of the railroads.

So I see no reason for any belief at all that the prospects of the operation of this property over any period of years will in any sense justify any increase in the amount of securities which it can maintain and pay interest on.

Of course, the road might issue more preferred stock or common stock, without any guarantee of any return on [fol. 110] them, but that would be of no advantage to securities holders who have been wiped out.

In that connection the Supreme Court, in its opinion by Justice Reed, says:

> "At this point, we restate our conclusion reached in the former cases that the Congressional Authority to the Commission to eliminate valueless claims from participation in reorganization is a valid exercise of the Federal bankruptcy power. Section 77 was directed at the relief of debtor railroads. Liquidation in depression periods meant that large portions of debts, as well as stock interests in the properties, would be irretrievably lost to their holders, while reorganization on a capitalization that estimated what normal income would support meant the salvage of sound values. We see no more constitutional impediment to the elimination of claims against railroad debtors by the Interstate Commerce Commission's determination

of values with judicial review as to the sufficiency of the evidence and compliance with statutory standards than we do to their elimination by an accepted bid in a depression market."

Thus, the Court reiterates the theory of Section 77 and that it is the duty of the Courts and the Commission to shake out valueless securities and not attempt to burden the property in the future with securities not justified by earnings.

[fol. 111] If the history of this railroad before reorganization teaches us anything, it is that over-capitalization has been the cause of these successive bankruptcies in respect to this property. As I have stated heretofore and state again, in my opinion this plan goes to the very limit in attempting to set up a capital structure justified by the earnings when we consider the past, present and future prospects of earnings of this property.

However, whatever my views may be on the factual situation, this motion of Mr. Gibson's is nothing more than a demurrer to Mr. Hodges' petition for an order to reopen this whole reorganization before the Interstate Commerce Commission and, as I have said, the case must be decided sometime. This case has been in court since 1935—a much longer period than contemplated by the Bankruptcy Act or the parties at the time the proceedings were initiated—and most, if not all, of the questions presented and raised in this petition have been thoroughly rehashed time and time again, not only before the Commission, but in this court. On appeal our Circuit Court of Appeals took cognizance of some of these arguments in their opinion. I mention this only because the decision of that Court reversing the opinion of this Court presented these questions very squarely to the Supreme Court, and, if I read the opinion of the Supreme Court correctly, they simply passed upon these contentions which were advanced and which were [fol. 112] adopted by the Court of Appeals. I feel bound by the findings of the Supreme Court, irrespective of any personal opinion I might entertain. All legal remedies have been exhausted, and the objectors have at all times had a fair hearing before the Commission and the Court, with a

full opportunity to be heard in making any kind of a record or argument they wanted, and it seems to me it is time for the opposition to this plan to bow to the inevitable.

Furthermore, I know of no rule by which this Court must take notice of or be guided by debates in Congress or recommendations or findings of its committees. They are not judicial in their nature. The Congress represents the legislative branch of the Government, and not the judicial, and until their views are put on the statute books, I do not believe this Court should allow itself to be influenced by these debates in the Congress, which are not conducted in accordance with rules of procedure that obtain in the judicial department of the Federal Government. Even if this so-called Reed bill, when passed, exempted this railroad from its provisions, so even if it had been approved by the President of the United States, we would not have been required to take any notice of it for that reason.

The Court now has before it the mandate of the Supreme Court, which is, of course, binding upon us and must be performed and carried out with due diligence.

This railroad should not be run by the Court. The [fol. 113] Court is not constituted to operate properties of this size or nature. For that reason, as soon as it is restored to the people that the law says are the new owners, the whole situation will be much clearer and the securities holders will be better off and more settled and know exactly what their rights are and what they are not.

Furthermore, in *Orten* vs. *Group of Institutional Investors*, 155 Federal (2d), 489, certiorari denied by the Supreme Court, a case in the Circuit Court of Appeals of the Seventh Circuit, the identical question was presented and relief denied. The Court said there in regard to a similar question:

> "We are also of the view that the order attacked is non-appealable, inasmuch as it merely denied the motion to vacate the order of consummation. There is no appeal from the order itself."

The Court then went on to say that they were not persuaded by the appellant's argument that its knowledge of

pending proposed legislation acquired subsequent to entry of the consummation order makes the general rule inapplicable in view of the uncertainty of the passage of the Reed bill or any similar legislation.

For these reasons the motion of Mr. Gibson to deny Mr. Hodges' motion for rehearing will be granted.

Mr. Hodges: Before signing that order, please look [fol. 114] and see, Your Honor, that order recites that you are hearing both the motion of Mr. Gibson and the motion of Mr. Burgess, and the motion of Mr. Burgess is not being heard today.

Mr. Burgess: My motion was almost identical with that of Mr. Gibson, except that it undertook to set forth some of the matters that we believed the Court should judicially know. My motion was that on its face your petition should be denied.

Mr. Hodges: If you are joining in supporting Mr. Gibson's motion, that is all right, but not your own motion, which is something quite different. If Your Honor rules in favor of Mr. Gibson's motion, you have disposed of our petition, and that is all there is to it, and that is quite satisfactory to me as a matter of procedure, but to hold me to having taken up the matters in Mr. Burgess' motion, that is something different.

The Court: Does it make any difference whether it recites that or not?

Mr. Hodges: It does to me.

Mr. Gibson: May I say a word to the contrary? It ill becomes counsel for the debtor to say that amendments to pleadings may not be made in the interest of justice and in accordance with the rules of civil procedure. It is perfectly clear that the Insurance Group Committee and the Senior Indenture Trustees would be entitled to ask Your Honor today to amend our motion so that it would be in the words and figures of Mr. Burgess' motion, and no [fol. 115] objection could be made to that, because they both say the same thing but in different words. There are

no new issues being raised, but Mr. Burgess is entitled to file his motion, and it is to the interest of an orderly hearing and the regularity and the dispatch of this Court's business that the order should be presented covering both of these motions, and we respectfully ask the Court that the order be entered.

Mr. Hodges: I ask Your Honor to strike out from the preamble the words—"and of the reorganization committee herein, filed October 29th, 1946"—to the effect that Your Honor's order will be to dismiss my petition, and there will be no order on Mr. Burgess' motion.

Mr. Burgess: Your Honor, I have no serious objection to eliminating from the draft order the words "and the motion of the reorganization committee herein, filed October 29th, 1946," if that would meet Mr. Hodges' objection.

Mr. Gibson: Is it Mr. Hodges' intention to have another argument on the motion?

Mr. Hodges: Mr. Burgess has withdrawn it.

The Court: With respect to the order, I will strike out the words at the end of the second line and in the third line —"and of the reorganization committee herein, filed October 29, 1946." As so corrected, the order as presented will be signed.

Mr. Hodges: Now, if it please the Court, I shall file [fol. 116] forthwith, and we have here, a notice of appeal to the Circuit Court of Appeals, and that order having now been entered, and the notice of appeal to the Circuit Court of Appeals having now been filed—can we assume it is filed?

The Court: Yes.

Mr. Gibson: We object to the filing of that notice on the ground that Your Honor's order is not appealable.

The Court: That is a matter for the Court of Appeals to decide, isn't it?

Mr. Gibson: I think it is, Your Honor. We want to be clear, to make our position uniform at all stages of the proceedings.

The Court: The record may show that motion and the observation of the Court that that is a matter for the Circuit Court of Appeals and not for this Court.

Mr. Hodges: Then, I move this Court for an order staying execution of the plan pending the determination of the appeal by the Circuit Court of Appeals.

The Court: That motion will be denied.

Mr. Hodges: That motion is denied, and may the record so show?

The Court: All right.

Mr, Hodges: There is one further thing I want to call to Your Honor's attention, before court adjourns.

We took no evidence this morning on this motion. Your [fol. 117] Honor's opinion commented upon various matters which were not in evidence and which I am sure were not in the record. They sounded as though it was a report of some of the trustee's organization to you, because of the information and details which you mentioned, things which were not brought to our attention. I merely want it to appear of record, and we are aware of the fact that Your Honor was referring in your opinion to matters of fact which were not introduced in connection with our petition, and that our petition was denied without a trial on the facts. Some of the things that the Court stated I also have reports on but my reports do not coincide with Your Honor's report, but it seems to me that is entirely irrelevant as being grounds for a denial of our motion.

The Court: There was nothing stated by the Court which was not in the record made in this court and which the Court has a right to take judicial notice of on any aspect of this reorganization proceeding.

Mr. Hodges: Is there anything in the record as to the Panama Canal? I was not aware that those things were in the record.

The Court: If you will read the record I think you will find it, and if it becomes necessary, they can be pointed out to you.

Now, we still have your motion for allowance of an expense fund. Do you want to take that up?

[fol. 118] Mr. Hodges: There is no occasion for that, Your Honor, if we are not going to take testimony. I would rather let it stand. I think it might be that we might be entitled to some allowance for the expense of appeal. I might wish to take that up. I would not ask you for any allowance for counsel fees, but I might come in later and ask for the expense of appeal. That would depend upon what the expenses are.

The Court: All right. That matter will not be set for hearing now?

Mr. Hodges: No. And then, the matter of the hearing on the facts, which is set for November 7th, that, goes over, I assume. That is, I should say it was nullified by Your Honor's ruling today.

The Court: All right.

Mr. Hodges: Is that correct?

The Court: Yes, all right. If there is nothing further, court will be adjourned until tomorrow morning.

(Whereupon, at the hour of 3:30 o'clock, p. m., court stood in recess.)

[fol. 119] UNITED STATES OF AMERICA
DISTRICT OF COLORADO } ss.

I, Fred C. Lebhart, the Official Court Reporter for the District Court of the United States, for the District of Colorado, hereby certify the above and foregoing to be a true and correct transcript of the proceedings had in the above-entitled matter in said court at the time and place as set forth.

FRED C. LEBHART,
Official Court Reporter.

Filed Nov 6 1946 Robert B. Cartwright Clerk.

[fol. 120] CLERK'S ADDITIONAL CERTIFICATE ON SHORT RECORD UNDER RULE 75(j) OF THE RULES OF CIVIL PROCEDURE

UNITED STATES OF AMERICA
DISTRICT OF COLORADO } ss.

I, G. Walter Bowman, Clerk of the District Court of the United States for the District of Colorado, do hereby certify the foregoing pages, numbered from one (1) to eighty-two (82), inclusive, to be a full, true and correct transcript of the official Court Reporter's transcript of the proceedings had in open court on October 30, 1946, as requested by counsel as additional record to the record previously certified and transmitted under Rule 75(j) of the Civil Rules of Procedure, in a certain case lately in said court pending, entitled In the Matter of The Denver and Rio Grande Western Railroad Company, Debtor, No. 8669, as fully and completely as the same remain on file and of record in my office at Denver, Colorado.

In Testimony to the above, I do hereunto sign my name and affix the seal of said Court at the City and County of Denver in said District, this sixth day of November, A. D. 1946.

G. WALTER BOWMAN,

(Seal) Clerk.

[fol. 121] CLERK'S CERTIFICATE.

United States Circuit Court of Appeals, Tenth Circuit.

I, Robert B. Cartwright, Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify the foregoing as a full, true, and complete copy of the transcript of the record from the District Court of the United States for the District of Colorado; a full, true, and complete copy of the transcript of trial proceedings had in said District Court; and full, true, and complete copies of certain pleadings, record entries and proceedings had and filed in the United States Circuit Court of Appeals for the Tenth Circuit in a certain cause in said United States Circuit Court of Appeals, No. 3425, wherein The Denver and Rio Grande Western Railroad Company, Debtor, et al. were appellants, and John Evans et al. were appellees, as full, true, and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 6th day of November, A. D. 1946.

ROBERT B. CARTWRIGHT,
Clerk of the United States Circuit
Court of Appeals, Tenth Circuit,

By George A. Pease,
Chief Deputy Clerk.

(Seal)

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 690

ORDER ALLOWING CERTIORARI—Filed December 16, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted. The case is assigned for argument on Monday, January 6, 1947.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8156)